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1040
NO. 2849

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ELIZABETH M. PRICE,

Appellant,

vs.

MARIE DEWEY WALLACE,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United
States for the District of Oregon.

Filed

AUG 30 1916

F. D. Monckton,
Clerk.

NO.....

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UNITED STATES CIRCUIT COURT OF
APPEALS
FOR THE NINTH CIRCUIT.

Elizabeth M. Price, Appellant,

vs.

Marie Dewey Wallace, Appellee.

NAMES AND ADDRESSES OF THE
ATTORNEYS OF RECORD:

Mr. William H. Hallam, Yeon Building, Portland, Oregon, for the Appellant; Wood, Montague and Hunt and Mr. Erskine Wood, Yeon Building, Portland, Oregon, and Mr. H. V. Mercer, Minneapolis, Minnesota, for the Appellee.

CITATION ON APPEAL.

United States of America,
District of Oregon—ss.

To Marie Dewey Wallace,

Greeting:

Whereas, Elizabeth M. Price has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, Oregon, in said District, this 6th day of January, in the year of our Lord, one thousand, nine hundred and sixteen.

R. S. BEAN,
Judge.

Elizabeth M. Price,

Service of the within citation by delivery of copy admitted this 6th day of January, 1916. All rights being reserved to object to the appeal or manner or time of perfection thereof.

Wood, Montague & Hunt,
Solicitors for Defendant.

Filed January 6, 1916.

G. H. Marsh, Clerk.

*In the District Court of the United States for the
District of Oregon.*

July Term, 1914.

Be it remembered, that on the 5th day of September, 1914, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit:

BILL OF COMPLAINT.

*In the United States District Court for the
District of Oregon.*

Elizabeth M. Price,

Complainant,

vs.

Marie Dewey Wallace,

Defendant.

To the Honorable, the Judges of the District Court of the United States for the District of Oregon:

Elizabeth M. Price, a citizen of the State of Minnesota, residing at Minneapolis, in said State of Minnesota, brings this her Bill of Complaint against Marie Dewey Wallace, a citizen of the State of Oregon, and

an inhabitant of the District of Oregon, defendant, and alleges and complains as follows:

I.

That the complainant, Elizabeth M. Price, is a resident of the City of Minneapolis, in the State of Minnesota, and has been such resident, and a citizen of said state for many years last past.

II.

That the defendant, Marie Dewey Wallace, is and for about four years last past has been an inhabitant and citizen of the State of Oregon, residing at the City of Portland, in said State of Oregon, and within the jurisdiction of the District Court of the United States for the District of Oregon.

III.

That the complainant is thirty-five years of age and is the only child of Lyman Ailes and Lillie D. Ailes, the latter of whom died in the month of June, 1900.

IV.

That long prior to the 12th day of July, 1893, complainant's mother, said Lillie D. Ailes, was duly and legally divorced from complainant's father, Lyman Ailes, and on said July 12th, 1893, complainant's said mother duly and legally intermarried with one Peter B. Smith, of Minneapolis, Minnesota, and thereupon, and until her death, was the wife of said Peter B. Smith, and lived with him as such wife at Minneapolis, Minnesota.

V.

That from the time of the marriage of said Peter B. Smith and complainant's mother until complainant's marriage to Donald MacLean in February, 1899, as hereinafter alleged, the complainant lived with her mother and her said step-father, in their house and home in Minneapolis, as a member of their family, and at the request of her mother and her said step-father, complainant thereupon abandoned and relinquished the name of Elizabeth M. Ailes and adopted and used the name of Elizabeth M. Smith, and was known to all her friends and acquaintances as Elizabeth M. Smith, and during all the time that complainant so lived with her mother and step-father she was loved, cherished, reared and educated and treated by them in all respects as their daughter, and was regarded and treated by her said step-father in all respects as if she were his own daughter, and complainant's said step-father told her that he wished her to forget that she had any other father, and wished her to regard him as her own, and only, father, and complainant's said step-father frequently, during the years following his marriage to complainant's mother, and after the death of complainant's mother, told complainant that he was a man of ample means and that complainant, as his daughter, would be well provided for, and would always have all the money she could need, and that he wanted her to acquire the accomplishments and modes and habits of life of other young women of means; and complainant's said step-father caused complainant to be clothed tastefully and expensively and supplied her liberally with spending

money, sent her to a fashionable young ladies' seminary and brought her up, generally, in the expectation of inheriting from him sufficient means to keep her in comfort and luxury all her life, and did not in any manner educate, prepare or fit her to earn her own living, and no part of the education or bringing up so given to complainant by her said step-father was in any manner intended or calculated to fit, qualify or enable complainant to earn her own living, or to provide for the support of herself and her children herein mentioned, in any way whatsoever.

VI.

That on February 20th, 1899, the complainant and one Donald MacLean, who was a surgeon in the United States Army, were legally married in the City of London, England, where complainant had gone for a visit, with the knowledge and approval of her said step-father, Peter B. Smith, and of said marriage two children were born, to-wit: Donald MacLean, Jr., who was born at Honolulu, in the Island of Hawaii, March 8th, 1900, and Robert MacLean, who was born at Minneapolis, Minnesota, July 8th, 1901.

That between the Spring of 1899 and the Spring of 1900 complainant's said husband, Dr. MacLean, was stationed or assigned to duty with troops of the United States Army at Washington, D. C.; Savannah, Georgia; San Francisco, California and Honolulu, in the Hawaiian Islands, successively, and complainant followed her said husband to his said various posts of duty, and made her residence with him, except during the Autumn

of 1899, when, at the request of said Peter B. Smith and his wife (complainant's mother) complainant left her said husband in camp at San Francisco, and returned to the home of her said parents in Minneapolis, Minnesota, for about six weeks, on account of the illness of complainant's mother, whom complainant helped to nurse, attend and care for.

During the winter of 1899-1900 complainant rejoined her said husband at Honolulu, where he was then stationed, and her said parents, viz: her step-father, the said Peter B. Smith, and her mother, spent the winter months at Honolulu, in daily intercourse with complainant and her husband. Complainant's mother was at that time suffering from a cancer, and was in extreme ill health, and shortly after the birth of complainant's said son, Donald, March 8th, 1900, said Peter B. Smith and his wife (complainant's mother) returned to Minneapolis, Minnesota, and thereafter said Peter B. Smith wrote frequently to the complainant and to her said husband, Dr. MacLean, urging that said Dr. MacLean resign from the Army and come to Minneapolis, Minnesota, with the complainant and her infant son, to be with him and his wife (complainant's mother) in the hope that thereby the life of complainant's mother might be prolonged, and her comfort and happiness be subserved; accordingly in the Spring of 1910, said Dr. MacLean resigned from the Army and removed with the complainant and their said infant son to Minneapolis, Minnesota, but arrived there only a few hours before the death of complainant's mother, who died on June 12th, 1900.

VII.

That thereafter during the summer months and September and part of October, 1900, complainant and her said husband and child made their home with complainant's said step-father, Peter B. Smith, in Minneapolis aforesaid, at his invitation and urgent request, he being at that time much broken in health and spirits, and in a melancholy state of mind, on account of the death of his said wife (complainant's mother) and said Peter B. Smith professed to be, and was, much attached to complainant and her little son, and frequently told complainant that she and her son, Donald, (whom he called his grand-son) were all that he had now to live for, and that he wished complainant and her family to make their home with him during the remainder of his life.

VIII.

That in the month of October 1900, complainant's said husband, Dr. MacLean (who had fallen into dissipated courses) became involved in some affair, the particulars of which were never known to complainant, but as the result of which the said Dr. MacLean left the City of Minneapolis and the State of Minnesota very hurriedly, and for a long time thereafter complainant was ignorant of his whereabouts, but she has since been informed and she believes that he first went to Mexico and other parts of the world and afterwards located at Carson City, Nevada, where he built up a medical practice, contracted another marriage, and now resides;

That at the time of said trouble in October, 1900, and when said Dr. MacLean, (with the concurrence of

said Peter B. Smith) deemed it imperative that he should depart immediately from the State of Minnesota, complainant wished to go with him, taking also their said infant son, but said Dr. MacLean had no plans for the future and had no means to provide for the future support and maintenance of complainant and her children (the complainant being then pregnant with her second son, Robert, who was born July 8th, 1901, as hereinbefore stated) and both he and complainant's said step-father advised and urged that she and her said son, Donald, remain at the home of her said step-father, and said Peter B. Smith, then and there, and frequently thereafter told complainant and impressed on her that said Dr. MacLean was not a man with whom complainant's future or that of her children could safely be trusted, and that complainant should give up all thought of rejoining her said husband or ever living with him again as his wife, and complainant's said step-father, Peter B. Smith, at that time, and constantly thereafter during the succeeding year advised and strongly urged complainant to bring a suit for divorce from her said husband, Dr. MacLean, and in the Fall of 1901, in obedience to the wishes of her said step-father, the complainant did bring an action against her said husband, in the District Court in and for the Fourth Judicial District, State of Minnesota, which is and then was a court of general and competent jurisdiction to secure a divorce from the bonds of matrimony, and to secure the custody of her said two children, and on January 9th, 1902, said court duly made and entered its decree of absolute divorce, divorce-

ing complainant from her said husband, Dr. MacLean, and awarding to her the custody of her said two children.

IX.

That in or about the month of October, 1900, at the time of said trouble of complainant's said husband Dr. MacLean, and both before and after the departure of her said husband, as aforesaid, complainant's said step-father, Peter B. Smith, offered and proposed to complainant (and, upon her assent and agreement thereto as hereinafter alleged, contracted and agreed with complainant) as follows:

The said Peter B. Smith agreed with and promised the complainant that if she would remain at his home with her said son Donald, and such other children might be born of her pregnancy above mentioned, and would make her home with him and live with him as his daughter, and treat and regard him as her own father, and care for him in his declining years, and assume the cares, duties and responsibilities of the management of his household, and be the mistress and housekeeper thereof, in the same manner and to the same extent as though she were his own daughter, he, the said Peter B. Smith, would care for and support the complainant and her children in the same manner as if she were his own daughter, and her said children his own grand-children, and would at his death leave and will to complainant for herself and her said children, all the property which he might then own, and said Peter B. Smith further told complainant that if she refused to do as he so advised and urged, but persisted

in going with or following said Dr. MacLean, that he, the said Peter B. Smith would cast her and her children off, and have nothing more to do with them, and would leave none of his property to them or either of them at his death;

That the complainant, having great confidence in, and respect for, her said step-father, and believing it to be true, as he told her, that her said husband had disqualified himself by some misconduct, '(the particulars of which were not told to complainant) from ever being able to live again with complainant and her children, or to provide a home for them, to to provide for their maintenance and support, acquiesced in, assented to and accepted the said proposal of her said step-father, said Peter B. Smith, and agreed thereto and gave him her promise to abide by, perform, and carry out said agreement on her part to the best of her ability.

X.

That under and pursuant to said contract and agreement, the complainant, immediately after the making thereof, in October, 1900, as aforesaid, entered upon, began and continued the full and proper performance of all the obligations of said contract on her part, and assumed the care and management of the home and household of her said step-father, said Peter B. Smith, and cared for and attended him and did her best to treat, care for and serve him, in all respects, as if he had been her own father and she had been his own daughter, and said Peter B. Smith, entered upon and began the performance of said contract and agreement on his

part, and maintained, supported and provided for the complainant and her son Donald as if she had been his own daughter, and said Donald his own grand-child, and introduced complainant as his daughter to such of his friends and acquaintances as came to the house, and after the birth of complainant's second son, Robert, in July, 1901, said Peter B. Smith duly provided for his support and maintenance, and both complainant and her said step-father, Peter B. Smith, continued to perform their respective duties and obligations under said contract or agreement until the modification thereof as hereinafter alleged.

XI.

That in or about the month of February, 1902, the said Peter B. Smith informed the complainant that he desired to marry the defendant above named, (whose name at that time was Marie Dewey Graham) and stated and proposed to complainant that inasmuch as the defendant would, after such marriage, relieve the complainant of much of her care and responsibility in the management of his household, and of the care, attention and service to himself required of complainant under the existing contract and agreement, and inasmuch as his said marriage with the defendant would give to the defendant greater liberty, and permit her to make visits, travel, and see more of the world (which he, said the complainant, as his daughter ought to do, and which he desired her to do, and all of which he then promised the complainant that he would arrange to have her do, and would pay and provide for) he thought the contract and agreement entered into between him and the complain-

ant in October, 1900, as hereinbefore set forth, should be modified with respect to his promise and obligation thereunder, to will and bequeath all of his property, at his death, to the complainant and her children, and he requested the complainant to consent that his said promise and obligation to the complainant under said contract might be so modified as to require him to leave, and bequeath to the complainant, for herself and her two children, two-thirds of the property which he might own at his death, to wit: one-third to the complainant for her own separate use and benefit, and one-third to the complainant for the use and benefit of the complainant's said children, and that the said Peter B. Smith should be permitted to bequeath one-third of his estate to the defendant, whom he then proposed to marry.

That the complainant assented and consented to the said modification of said contract and agreement and then and thereupon the said contract and agreement of October, 1900, above mentioned, was by the mutual consent of complainant and said Peter B. Smith so modified as aforesaid, and the said Peter B. Smith in consideration of the complainant's said consent to such modification of said contract of October, 1900, and in consideration of the full and faithful performance of said contract by the complainant up to that time and of complainant's promise and agreement to continue the performance of said contract as so modified, so far as the said Peter B. Smith might desire and permit her to do, promised and agreed with the complainant that he would, at his death, leave, and bequeath to complainant for herself and her said two children two-thirds of all his prop-

erty which he might then own, one of said third parts to be and belong to complainant for her own separate use and benefit, and one thereof to go to the complainant in trust for her said children, and for their benefit; all of which said agreement and modified agreement was then and there, to-wit: in February, 1902, stated and explained to defendant, who fully assented thereto and expressed herself as satisfied therewith, and defendant has ever since had full knowledge thereof, and the complainant thereupon and thereafter continued to live with her said step-father as his own daughter, and to care for and serve him, and performed all of her duties and obligations to him under the said contract as so modified, so long as he permitted her to do so, as hereinafter alleged.

XII.

Complainant further alleges that the defendant and the said Peter B. Smith were married, the one to the other, in or about the month of May, 1902, and for about fifteen months thereafter the complainant and her said two children continued to make their home with said Peter B. Smith and the defendant as his wife, as one family, with the exception that during a part of said year the complainant, being in great part influenced thereto by reason of some differences between her and the defendant over matters concerning the management of said household and the complainant's said children, with the approval and consent of her said step-father, Peter B. Smith, secured and filled a short engagement in the chorus of an Operatic Company, leaving her said

children with her said step-father and the defendant during her absence.

XIII.

Complainant further alleges that on her return from said Theatrical engagement in the Spring of 1903, complainant again took up her residence with her said step-father and the defendant and, with her children, resided with them for several months at the home of Peter B. Smith aforesaid, and in August or September, 1903, at the request of the defendant, who was annoyed at the presence of complainant and her children in said household, the said Peter B. Smith sent the complainant and her children to board with friends of his in California, where the said Peter B. Smith paid all the expenses of the support and maintenance of complainant and her children and corresponded regularly with complainant, as his daughter.

XIV.

That in August, 1905, the complainant married Edward J. Price, at San Jose, California, with the consent and approval of said Peter B. Smith, but within a little more than two years thereafter, the said Edward J. Price abandoned and deserted the complainant, and wholly failed to provide any home or income for her or her said children, and said Edward J. Price died at Sacramento, California, on or about March 3rd, 1914; and after the death of said Peter B. Smith, in August, 1907, as hereinafter set forth, the complainant left California, and returned to Minneapolis, Minnesota, with her said children, where she has ever since lived, making such

efforts as she could to earn a support and maintenance for herself and her said children.

XV.

Complainant further alleges that said Peter B. Smith owned no real estate at the time of making said agreement of October, 1900, or at the time of making said modified agreement of February, 1902. But at both of said times, and at all times for many years before his death, he owned a large amount of personal property; and on August 16th, 1907, said Peter B. Smith died leaving no real estate, but a large amount of personal property, several items of which are hereinafter enumerated, and leaving also a last will and testament, executed by him January 10th, 1906, wherein and whereby he gave and bequeathed all of his property to the defendant above named, and nominated and appointed said defendant sole executrix of his said will, and on August 27th, 1907, the defendant duly petitioned the Probate Court in and for Hennepin County, Minnesota, where said Peter B. Smith resided at the time of his death, for the allowance and probate of said will.

XVI.

Within a few days after the death of the said Peter B. Smith, and before the defendant had petitioned for the probate of his said will, to-wit: about August 23rd, 1907, the complainant arrived in Minneapolis, Minnesota, from California, and had a conference with the defendant, who told complainant of the will so left by said Peter B. Smith, and spoke to complainant of the

agreement and modified agreement, made between said Peter B. Smith and complainant, hereinbefore mentioned, and defendant then told complainant that it had been understood and agreed between said Peter B. Smith and defendant, that if he should leave all his property by will, in terms, to the defendant as a protection against the possible dissipation by complainant's said husband, Edward J. Price, of the two-thirds thereof, which said Peter B. Smith had promised and agreed to leave to complainant for herself and her children, that defendant should take and hold two-thirds of the property which might be left by said Peter B. Smith, in trust for, and for the benefit of, the complainant and her said two children, and that defendant should account to complainant for said two-thirds of said property, for her own benefit and that of her said two children, and should in due time, and whenever it might seem safe and advisable so to do, turn over and deliver said two-thirds of said property to the complainant for her own benefit and that of her said children, in accordance with the terms of said agreement and modified agreement aforesaid; and complainant alleges, that she thereupon suggested and stated to defendant, that she supposed she had better employ a lawyer and take legal advice as to her rights in the estate of the said Peter B. Smith, deceased, under and by virtue of the said agreement and modified agreement, hereinbefore mentioned, and as to the proper steps for complainant to take for the protection and enforcement of her said rights and interest, but defendant thereupon dissuaded complainant from taking counsel or consulting anyone about her rights

in said estate, and stated to complainant that she, defendant, well knew and understood the agreement and modified agreement made between complainant and said Peter B. Smith as aforesaid, and well knew that said Peter B. Smith desired and intended to have the same fully and faithfully carried out and performed on his part, and with respect to the distribution to complainant for herself and her children of the said two-thirds of his property, and said defendant promised complainant and agreed with her that if she would refrain from consulting any lawyer or taking any advice with respect to her rights under said agreement and modified agreement, and from taking any steps to establish, protect or enforce the same, and would refrain from appearing, or having any appearance made on her behalf, the probate proceedings on said will, or with respect to the administration upon, or the distribution of the estate of said Peter B. Smith, but would allow his said will to be admitted to probate without objection or appearances on the part of this complainant, and without the assertion of any claim by complainant against the estate of said Peter B. Smith, under or by reason of the said agreement and modified agreement, and would allow the distribution of the said estate to be made to defendant as the sole legatee, in accordance with the terms of said will, and without the assertion by complainant in any Court, of the rights and interests of herself and her children in the property of the said estate, under and by reason of the said agreement and modified agreement, between complainant and the said Peter B. Smith, and the complainant's performance thereof, that she, the said

defendant, would respect, recognize and protect complainant's said rights and interests in and claims upon the property of said estate, and would take all the property of said estate in her own name as sole legatee and distributee thereof, but, that she would so take and hold two-thirds of said property, in trust, and charged and impressed with a trust, in favor of complainant and her said children, and would faithfully account to the complainant, on her own behalf and for her own use and benefit as to one-third of said property, and for the use and benefit of complainant's said two children with respect to one-third thereof, and would truly and faithfully turn over to the complainant for her own use and benefit and for the use and benefit of her said two children, two-thirds of all the property of said estate, after payment of all debts of said Peter B. Smith, and the expenses of administration of said estate, and after the final distribution of said estate, and the full and final delivery to defendant of all the properties thereof:

And complainant alleges that she believed and relied on said promises and undertakings of the defendant, and because of said reliance complainant complied with defendant's said requests and refrained, as she would not otherwise have done, from taking legal advice with respect to the protection of her said rights and interests, and from making any claim on or appearance in any Court with respect to her said rights and interests, for herself and her said children in the property of the said Peter B. Smith, and refrained from asserting her said claims against his estate, but permitted defendant

to administer and receive all of the same in her own name—but charged with the protection and execution of said trust as respected the two-thirds thereof— as so proposed by defendant;

And complainant alleges that she is informed, and on such information and belief she avers that at some time during the Spring or Summer of 1908, (the precise date whereof complainant does not know), the defendant received and came into possession of all the property which belonged to the said Peter B. Smith, at the time of his death, under and pursuant to a decree of distribution duly made and entered by the Probate Court in and for Hennepin County, Minnesota, in which said decree the defendant was named as the sole legatee and distributee of said estate.

XVII.

And the complainant alleges that among other items of the estate of said Peter B. Smith so distributed to, and taken possession of by the defendant, were 'the following to-wit:

Furniture and household goods of the ap-	
praised value of.....	\$ 500.00
of the appraised value of.....	4,000.00
170 shares of stock in Washburn-Crosby	
40 shares of stock in Royal Milling Company	
Company of the appraised value of....	39,100.00
54 shares of stock in Imperial Elevator Com-	
pany of the appraised value of.....	5,400.00
20 shares of stock in St. Anthony Elevator	
Company of the appraised value of....	1,000.00

224 shares of stock in St. Anthony & Dakota Elevator Company of the appraised value of.....	35,168.00
25 shares of stock in Kalispell Milling Company of the appraised value of.....	2,500.00
100 shares of stock in Belen Mining Company, an Arizona Corporation, of the appraised value of.	1,000.00
1,650 shares of stock in Hubbard Elliott Copper Mining & Development Co of the appraised value of.....	16.50
500 shares of stock in Minneapolis Copper Development Company of the appraised value of	5.00
1 membership in the Minneapolis Chamber of Commerce of the appraised value of.	3,000.00
1 life insurance policy in Mutual Life Ins. Co., N. Y., of the appraised value of...	4,690.00
1 life insurance policy in Northwestern National Life Insurance Co. of the appraised value of.....	1,649.00
In all, of the appraised value of.....	<hr/> \$98,028.50

But the complainant avers and alleges upon information and belief, and charges the fact to be that each of said items of personal property hereinbefore described, was, at the time of its appraisement, and also at the time of its delivery to defendant as aforesaid, and ever since has been, and now is, of a far greater value than the sum at which it was appraised by said appraisers, as above set forth, and complainant further

avers and alleges upon information and belief, and charges the fact to be that the defendant received and took possession of, and now holds a large amount of other personal property, which belonged to said Peter B. Smith at the time of his death, in addition to, and aside from the items above enumerated, but complainant does not know, and has no means of ascertaining the particular descriptions thereof, or the value of the several items thereof, but the complainant is credibly informed and verily believes, and on such information and belief she avers that the property of the estate left by said Peter B. Smith, which came into the hands of the defendant and was so received and taken possession of by defendant in the Spring or Summer of 1908, was of the aggregate value of not less than \$150,000.00.

XVIII.

Complainant further alleges that she has on several occasions since the early Summer of 1908 endeavored to obtain from defendant a true and correct statement or account of the property and items of property so received by defendant from the estate of said Peter B. Smith, and of the value thereof, and has requested defendant to account to the complainant therefore, and either to turn over and deliver to the complainant for herself and her said children the two-thirds interest therein so held by defendant in trust for the complainant, in her own behalf, and for the use and benefit of her said children, or to execute a declaration of trust in due form of law to the complainant, for herself and her said two children, specifying the items of property

so held by defendant in trust for the complainant and her said children, and acknowledging and declaring the terms of said trust, and the duties and obligations of defendant as such trustee with respect thereto, but the defendant has hitherto failed and neglected to comply with said request in any manner whatsoever;

And the complainant has duly demanded from the defendant an account of the rents, profits and income, received by the defendant, from the said property so held by defendant, under said trust, for the benefit of the complainant and her said children, and has demanded payment by defendant to complainant of said rents, profits and income, and has duly demanded from said defendant that she turn over and deliver to complainant for her own benefit and the benefit of her said children, the said property so held in trust by defendant for them as aforesaid, and the defendant has at all times refused, failed and neglected to comply with any of said requests or demands of this complainant.

Wherefore, complainant prays the judgment and decree of this Court:

1st. That in and by said judgment and decree it be deremined and adjudged, that the defendant at all times since the death of the said Peter B. Smith, was and has been and now is a trustee, of her own wrong or otherwise, for the benefit of this complainant and her said two children, with respect to a two-thirds interest in all the property of the estate of said Peter B. Smith, deceased, at any time received by the defendant; and that the complainant for herself and her said two

children is the beneficial owner of all said two-thirds interest in said properties and is the cestui que trust, under said trust.

2nd. That the defendant be required to render to this Court a full, complete, true and correct account of each item of property, received by defendant from the estate of said Peter B. Smith, deceased, and of the rents, profits, income or revenue derived therefrom by the defendant since the death of the said Peter B. Smith, and of all increase thereof so received by defendant.

3rd. That in and by said judgment and decree the defendant be removed from her said trust, and be ordered and required to transfer, assign and turn over, either to the complainant or to such new trustee of said trust, as may be appointed by this Court—in case this Court shall deem it necessary or advisable to continue said trust, and to appoint a new trustee to execute the same—two-thirds of all the property received by defendant from the estate of said Peter B. Smith, deceased, together with all profits, income and increase received by defendant thereon, or the full and true value thereof, and each item thereof, in case it shall appear upon said accounting that the defendant has converted or parted with the property so received by her from the estate of said Peter B. Smith, or any items thereof.

4th. In case this Court shall deem it necessary or advisable that a new trustee be appointed in the place and stead of the defendant, to carry out and execute the

trust hereinbefore set forth, then that, in and by said judgment and decree, this Court appoint a new trustee in place and stead of the defendant for that purpose.

5th. That in and by said judgment and decree, this Court grant such other, further or different relief to the complainant as to the Court may seem just and equitable.

6th. That the complainant recover from the defendant her costs and disbursements herein, and such reasonable counsel fees incurred by the complainant in the bringing and prosecution of this action, as may be allowed by the Court.

Wm. H. Hallam,
Solicitor for Complainant.

A. B. Jackson,
of Counsel for Complainant.

State of Minnesota,
County of Hennepin—ss.

Elizabeth M. Price, being first duly sworn, deposes and says that she is the plaintiff in the foregoing within entitled action; that she has heard read the foregoing complaint knows the contents thereof, that the same is true of her own knowledge except as to such matters as are therein stated on information and belief and as to such matters she believes it to be true.

Mrs. Elizabeth M. Price.

Subscribed and sworn to before me, a Notary Public, this 19th day of August, 1914.

Arthur M. Higgins,

Notary Public, Hennepin County, Minnesota.

(Notarial Seal.)

My commission expires January 7th, 1920.

Filed September 5th, 1914.

G. H. Marsh, Clerk.

And afterwards, to-wit, on the 9th day of October, 1914, there was duly filed in said Court, and cause, an Answer, in words and figures as follows, to-wit:

ANSWER.

For her answer to the complaint herein the defendant:

I.

As to paragraph number "I," denies that plaintiff is a resident of Minneapolis, Minnesota, and alleges upon information and belief that plaintiff and her sons were, at the commencement of this action, and now are, residing in the home of plaintiff's father, Lyman S. Ailes, a widower, at or near the City of Leavenworth, State of Washington; admits upon information received since this action was brought, that the plaintiff has spent a large part of her time in Minneapolis, Minnesota, during the last four years.

II.

As to paragraph "II," admits that defendant is a citizen of the District of Oregon and resides at Portland, in said State, and has been such for more than four years last past.

III.

As to paragraph "III," admits that plaintiff is thirty-five years of age and is the only child of Lyman Ailes and Lillie D. Ailes, the latter of whom died in June, 1900, and states that Lyman Ailes, plaintiff's father, is now living.

IV.

As to paragraph "IV," admits upon information and belief that at sometime, the exact date of which this defendant does not know, the parents of said plaintiff were divorced and at some date, about the time alleged in the fourth paragraph, the mother of the plaintiff was legally married to Peter B. Smith at Minneapolis, Minnesota, and thereafter continued as his wife until her death, residing with him at Minneapolis, Minnesota.

V.

As to paragraph "V," admits upon information and belief, obtained long after the death of plaintiff's mother, that the plaintiff resided with her mother and her said stepfather in Minneapolis, after their marriage, during the larger part of the time until she was married to Donald MacLean in or about February, 1899, but states that she was known to her friends as Eliza-

beth M. Ailes, and sometimes called Smith during that period; but alleges upon information and belief that the plaintiff was neither universally known as nor called by the name of Smith; that occasionally she resided and travelled with her own father during that period, and was with her own father at the time she met said MacLean; that she was with her own father constantly during their acquaintance, courtship and marriage, all of which took place in London, England, without the knowledge of either her mother or said Peter B. Smith; that said marriage occurred at a time when the mother and said stepfather were in or near Minneapolis, Minnesota; that as to whether, and to what extent, if at all, her stepfather treated the said complainant in any other or different way than a respectable stepfather would ordinarily treat a child, and as to whether he told her that he had means or ample means, or that he would ever have any provision made for her in the way of money or property, or as to what, if anything, he may have told her with respect to accomplishments or modes and habits of life, or as to how he may have caused her to be clothed or supplied with spending money, or as to what he wished her to call him, or what he may have said about her father, during the period and up to about the time of her marriage to said Donald MacLean, this defendant has neither knowledge nor information sufficient to form a belief, and therefore denies the same and puts the plaintiff upon her proof thereof, if the same be held material; this defendant further states that she has since been informed and believes that said stepfather and mother did send the

plaintiff to a Young Ladies' Seminary, for a time, at least, prior to her marriage to said MacLean, but as to whether they did not do what they could have done to cause her to prepare herself to earn a living for herself and her children, other than as a wife, this plaintiff has neither knowledge nor information sufficient to enable her to form a belief, and therefore puts the plaintiff upon her proof of the same, if it be held material; but defendant alleges, upon information and belief, that said plaintiff was not denied by either her mother or her stepfather the means of pursuing any elevating study which she was willing to pursue; and that said Smith did, in later years, consult with her own father as to what could be done with plaintiff.

VI.

As to paragraph "VI," admits, upon information and belief received much later, that the plaintiff married Donald MacLean, who was a surgeon in the United States Army, in February, 1899, in London, England, where the plaintiff, as defendant alleges, had gone under the name of Ailes while in the care of her own father; and states that she is informed and believes that said marriage took place without the knowledge of said Peter B. Smith that any such marriage was contemplated or that there was such person as Donald MacLean; admits, upon information later received by her, that Donald MacLean, Jr., was born as an issue of that marriage in Honolulu in 1900, and that Robert MacLean was born at Minneapolis, Minnesota, about 1901; admits that she is now informed and believes that

said Donald MacLean, while in the government service as a surgeon, was stationed at various places during the period he remained in that service, but the exact places of which she does not know, and if it be material asks that the plaintiff be put upon her proof thereof; and alleges that she is now informed and believes that said Donald MacLean is a physician and surgeon, with a very good private practice, in Carson City, Nevada, and that at the present time and during a good portion of the time since said marriage, has contributed to the support of the plaintiff and said children and would be exceedingly glad to take care of said children at this time; admits and alleges, upon information acquired some years afterward, that said plaintiff came to Minneapolis for a few weeks while her mother was ill, as a daughter would ordinarily desire to come and visit her mother, but denies that said visit had any other or greater significance as between her and her stepfather than such as ordinarily exist at such times; that the plaintiff's mother was, at the time of said visit, afflicted with ill health and that plaintiff returned to her husband, but plaintiff was more or less with her mother during the time of her illness when said stepfather was present, but denies knowledge of any letters written by the said Peter B. Smith to either the plaintiff or her husband during that period explaining the advantages of a private practice over a government position, and therefore puts the plaintiff upon her proof, if it be held material; denies knowledge as to what, if anything, said Donald MacLean and family did either as to resignation from the army or removal to Minneapolis, and asks

that plaintiff be put upon her proof if they be held material.

VII.

As to paragraph "VII," denies that said Peter B. Smith was broken in health during the year 1900, so far as the information of this defendant goes; denies that he was, so far as she ever knew, particularly melancholy; denies that he, so far as she knew, requested plaintiff and her family to make their home with him during the remainder of his life, or for any particular time; denies any knowledge of such, if any, kindly or sympathetic expression of feelings as temporary grief may have brought forth, such as alleged in said paragraph, or that he called Donald his grandson.

VIII.

As to paragraph "VIII," admits that she is now informed and believes that said Donald MacLean contracted for a time the habit of drinking and as a result was involved in some affairs in Minneapolis which really caused him to leave the city; but states that the plaintiff knew the particulars thereof; that this defendant had no knowledge as to whether said Peter B. Smith concurred in the removal of said MacLean from Minneapolis, or as to whether plaintiff was either persuaded or urged, either then or thereafter, to bring a suit for divorce against him, or whether she did the same of her own accord; but alleges, upon subsequent information, that the plaintiff wished to go with him and take their son and that said Donald MacLean and the

plaintiff did not expect their separation to be permanent, for a long time thereafter, and until the following year; that when said Donald MacLean left Minneapolis the plaintiff was permitted to stay on in the home of said Peter B. Smith because at the time she did not have sufficient means to leave; that the said Donald MacLean, as she is informed and believes, later built up a medical practice located in or about said Carson City, Nevada, and has contributed to the support of plaintiff and their children and has offered to take care of the boys if permitted to do so by plaintiff; that the plaintiff, because she herself desired to do so, sometime in 1901, decided not to go to said husband and brought an action for divorce against him in the Fall of 1901, in the District Court in and for the Fourth Judicial District, State of Minnesota, wherein the court on the 9th day of January, 1902, gave her a decree of absolute divorce, upon default, and awarded her the custody of said two children; but denies any knowledge of any part had by said Smith in any counsel which he, as a layman, may have offered as to her matter of residence, support or divorce, and demands that the plaintiff be put upon her proof as to the same, if it be held material herein.

IX.

As to paragraph "IX," denies that she has knowledge that said Peter B. Smith ever either offered or proposed, or that the complainant either ever assented or agreed with him, or that they ever either contracted or agreed to contract to any of the things set forth in the ninth paragraph of said complaint, and particularly

as to either any arrangement or agreement either to the effect that plaintiff should live with him as his daughter, care for him in his declining years, assume the cares, duties or responsibilities of his household, or be the mistress or housekeeper thereof as if she were his daughter, or otherwise, or at all, or should during any such period either keep her children with him, or that he would treat her as his own daughter, or either leave or will to her, either for herself or for her children, either any, or all of the property which he might own at the time of his death, or at all; denies that he agreed to do so either to induce her to leave her said husband, Donald MacLean, or that he ever in the slightest way attempted to break up their matrimonial arrangements, and denies all knowledge of any such arrangement or agreement, and alleges that she is informed and believes that such was never made or attempted to be made.

This defendant alleges as to the whole complaint that if either any such arrangements or any modification thereof ever was attempted that none thereof was in writing, nor was it ever communicated to this defendant, nor was any claim of it ever made on this defendant until another suit, in effect the same as this, was brought against her long after the death of said Peter B. Smith, and after his estate had been probated, which other suit will be described hereinafter; that she is informed and believes that the said plaintiff had neither the power nor right to make such contract with said Peter B. Smith; that she had no power to make such contract as to said children or either of them; that she had no right or power to make such agreement; that

said Peter B. Smith had no right or power to make such agreement as against this defendant, or any one else whom he might subsequently marry, without knowledge of said agreement, and without obtaining her consent thereto, or at all; that said agreement, if it ever was made, or attempted to be made, was and is illegal and void as against the statute of frauds and against the public policy of Minnesota, and was neither kept nor performed by said plaintiff.

X.

As to paragraph "X," denies upon information and belief that the plaintiff ever treated said Peter B. Smith as a father; denies that she ever served him as if he had been her own father; denies that either she or he ever had any contract, either of the kind she designates or otherwise; denies that they ever performed the relations of daughter and father, or any other relations nearer or closer than those between the ordinary stepfather and stepdaughter who resides with her mother, with such intervening marriages of plaintiff as are admitted herein; and states, upon information and belief, that their relations were not as close as they might otherwise have been, because the said plaintiff had a father living during all the times mentioned in said complaint, and who is now living, and that said plaintiff had been careful, as she informed this defendant after defendant's marriage to Peter B. Smith, not to do anything which would cause her to be in the category of an adopted daughter of said Smith, and thereby lose her chance of a right to inheritance from her own father

XI.

As to paragraph "XI," admits that this defendant's name was Marie Dewey Graham before she married said Smith; denies, upon information and belief that there ever was either any such arrangement or talk between said Smith and said plaintiff, as alleged in paragraph XI of said complaint; denies that there was either any recognition or modification of either any contract or pretended contract between them; denies that there was either any contract or agreement then either made or in existence between them; denies that said Smith then ever either promised or agreed to bequeath to the complainant, either for herself or for her children, or either of them, any property; denies that there was any agreement either at that time or at all between either the said parties or either of them and the said Smith as to bequeathing any part of his estate to this defendant; denies that there was any consideration for any such agreement passing from either the plaintiff or any one else to said Smith; denies that there was any agreement either as alleged in said complaint or otherwise or at all between said Smith and said plaintiff for any trust relation as either alleged in said complaint or otherwise, or at all; denies that there was ever either any explanations or statements to this defendant respecting either any of said transactions or alleged transactions; denies that she ever either assented thereto or expressed herself as satisfied therewith; denies that she ever either had any knowledge or any notice of any such agreement; denies that said plaintiff, after defendant's marriage to said Smith, or at all, so far as

this defendant knows, ever either cared for or served him, either as a daughter or otherwise, either under the said contract or any contract, but alleges that she was, during the whole period, within the knowledge of this defendant constantly annoying him by various petty tricks and devices, including schemes to get money out of him for useless purposes and kept him greatly worried and almost constantly troubled when she would be with or near him.

XII.

As to paragraph "XII," admits that this defendant and said Peter B. Smith were married to each other in the month of May, 1902; admits that for a number of months following the said marriage, complainant and her children lived in the house with this defendant and said Peter B. Smith and were supported by them; denies that there were any difficulties, so far as this defendant ever knew, between her and the said plaintiff during the time she and her children resided there, either about the management of the household or the complainant's said children; but alleges that this defendant had the entire management of said household as soon as she came into the home and that there was considerable difficulty during that time between said plaintiff and the said Peter B. Smith over the conduct of the plaintiff with respect to various matters; that among other things said Peter B. Smith had furnished money to the said plaintiff to pay household bills during the time he and this defendant were away on their wedding trip; that upon the return from said wedding trip said Smith as-

certained that the moneys that had been furnished had not been used by plaintiff for the purposes for which they were entrusted to her, but had been dissipated and that a great many bills had been charged to him by the plaintiff; that he objected seriously to that sort of conduct upon her part, and in order to shield the plaintiff and prevent unpleasant talks about the house between plaintiff and said Smith, this defendant, for a time, took money from her own allowance and undertook to aid the said plaintiff in paying up the bills she had then contracted, but found it impossible; that said Smith was troubled and annoyed a great deal from that time on by such things as accounts that had been charged to him by said plaintiff without his authority, and against his will, and in matters that were unnecessary and extravagant and by want of self-control on her part; that on one or two occasions the plaintiff took diamonds that formerly belonged to her mother and acquired money upon them at pawnshops, and let it be known to said Smith, who was greatly exercised on account thereof and who would, in order to save his own name from disgrace, buy up the pawn tickets; that the said plaintiff did go on the stage for a short time during the period mentioned in paragraph XII of said complaint, leaving her children in charge of this defendant and said Smith, but that arrangement, as plaintiff well knew all the while, was one which did not please said Smith but she took the position that it was her affair and went, irrespective of the displeasure of said Smith.

XIII.

As to paragraph "XIII," admits that the said

plaintiff and her children resided in the household of said Smith and this defendant from the time when the plaintiff left the stage, for some months thereafter, but states that her leaving the house was not due to annoyance as between her and this plaintiff, but the fact that the plaintiff so annoyed the said Peter B. Smith by her various lines of conduct that he sent her to her relatives in Ohio to board, he paying the expenses, but the plaintiff was dissatisfied there and returned, without his consent, and said Smith then had to appeal to her own father, Mr. Ailes, to do something with her; that it was then arranged between her and said Smith and her father that she would go to Tacoma, Washington, taking the children, to make their home with friends of her father, the arrangements being made by her father, where for a time the said Smith and her father would jointly aid in paying their expenses, but her father failed to make all of his payments and said Smith contributed more than his equal share; that she soon left the place where her father had located her and went down into California where, as defendant is informed and believes, Donald MacLean spent some time with them; that sometime afterwards she notified said Smith that she had another prospective husband, a Mr. Price, whom she married and who was young and not getting a large salary as yet, and asked said Smith to continue the same aid to her that he had been giving after she left Minneapolis, but he declined to do so, although he donated to her small sums of money for a while after her marriage to said Price, and finally let them have money with which to aid in building them a house in California, and

being neither bound by blood, agreement, law nor honor to make such contributions, he then ceased; that said Price was connected with his own father in business near where they resided, and the said Smith took the note of plaintiff's said husband, Price, in the amount of \$2000.00 for that much of the loan, and thereafter, as this defendant is informed and believes, made no contributions (unless it was small Xmas presents) to her support or that of her children, except that he attached a memorandum in his own handwriting, on a separate sheet of paper, to the note which had been then taken from her said husband for the balance of the money which he had contributed to their house, which memorandum read as follows:

“In the event of my death before the maturity of this note it is my wish that it shall not be considered of any value and returned to Mrs. E. J. Price as a bequest from me.

P. B. Smith”;

That said Smith did die before the maturity of said note; that the said note was delivered to the said plaintiff and her said husband on or about the 13th of September, 1907, in the office of this defendant's counsel, as administratrix, in fulfillment of the foregoing wish and bequest, and the following receipt taken therefore, upon the back of the paper upon which the above wish had been expressed:

“Minneapolis, Minn., September 13th, 1907.

“Received from Mrs. P. B. Smith that cer-

tain promissory note signed by Edwin J. Price, in the words and figures following, to-wit:

“\$2000.00 Mill Valley, Cal., 10/15, 1906.

“‘Five (5) years after date I promise to pay to the order of Peter B. Smith Two Thousand Dollars, for value received, with interest at the rate of 5 per cent per annum from date and if the interest be not paid annually, to become as principal, and bear the same rate of interest. This note is negotiable and payable without defalcation or discount and without any relief or benefit whatever from stay, valuation, appraisement, or homestead exemption laws.

(Signed) Edwin J. Price.’

Elizabeth Smith Price.

Edwin J. Price.

“In presence of Geo. P. Wilson.”

And an additional receipt was then taken from said plaintiff and her said husband in fulfillment of the request and bequest, in the following form:

“We acknowledge receipt of said note in fulfillment of the request of said deceased and as a bequest from him, expressed by him in words and figures following:

“‘In the event of my death before the maturity of this note, it is my wish that it shall not be con-

sidered of any value, and returned to Mrs. E. J. Price as a bequest from me.

(Signed) P. B. Smith.'

Elizabeth Smith Price.

Edwin J. Price.

"In presence of Geo. P. Wilson."

XIV.

Answering the 14th paragraph of said complaint, this defendant admits that the said plaintiff married Edwin J. Price of San Jose, California, in California about the year 1905, but states that the same was a matter of her own choice and that the said Price was not known to this defendant or the said Peter B. Smith at the time, and said Smith had nothing to do with the marriage except to cut down his donation as aforesaid; that the donations, like all of the remainder he spent upon her or the children, were simply spent as gifts because he had married her mother and she had lived in the house with them and did not seem to be willing or able to take up any vocation that would earn a living, and her own father was apparently unable at times to contribute to her support; denies upon information and belief that said Edwin J. Price ever abandoned or deserted the plaintiff; as to whether or not said Price died on the 3rd day of March, 1914, this plaintiff does not know; as to whether the plaintiff returned to Minneapolis in August, 1907, and remained there with her children since that time, this defendant does not know but alleges that the said plaintiff has at times, as this

defendant is informed, since this action was brought, been in the City of Minneapolis and was there a while during the pending of the former action brought by her as herein alleged.

XV.

Answering the 15th paragraph, the defendant admits that said Peter B. Smith owned no real estate at the time of his death, and that he owned none in either October, 1900, or February, 1902; admits that he owned some personal property in 1902, but alleges that it was not worth then to exceed \$40,000.00, and the exact value she does not know; that when he died he owned more valuable personal property but of no greater amount than specified below; admits that he died on August 16, 1907, leaving no real estate and only the personal property enumerated in the items set forth by specific descriptions in paragraph 17 of said complaint, and no more, except such as is otherwise mentioned herein; admits that the said Peter B. Smith executed a last will and testament on the 10th day of January, 1906, in and by which he gave and bequeathed all of his property to this defendant and named, nominated and appointed her his sole executrix of said will; that on the 27th day of August, 1907, she duly petitioned the Probate Court in the County of Hennepin and State of Minnesota, where the said Peter B. Smith resided at the time of his death, for the allowance and probate of said will, and alleges that said allowance and probate were granted to her.

XVI.

Answering paragraph "XVI," admits that plaintiff

arrived in Minneapolis sometime about the first of September, 1907, but not before, with her husband and came to the home of this defendant and visited her for a short time; but denies that defendant ever told the plaintiff about the will that was left by said Peter B. Smith; that she ever discussed with the complainant either any agreement or modified agreement between said Peter B. Smith and complainant, either as mentioned in said complaint, or otherwise, or at all; that plaintiff then told defendant of either any agreement or understanding between said Peter B. Smith and complainant, either with respect to the leaving of said property to said defendant in trust, either as a protection against dissipation of complainant's said husband or for plaintiff or her children, or anything of that sort; that they ever had any conversation respecting either such pretended contract or trust; that there was ever either any request, promise or agreement made between them with respect to any such matters; that there was ever any discussion between them with respect to turning over any portion of said property, either to the plaintiff or to, or for, the use of either her or either of said children; that this defendant ever stated anything to the effect that any portion of said property would ever be delivered either to the plaintiff for her own benefit or for her children, or otherwise, or at all; denies that said plaintiff ever suggested to this defendant anything either with respect to employing a lawyer or taking legal advice or anything else either of that sort or nature, or that there were any suggestions, either expressed or implied, either applicable to any pretended agreement or modification thereof,

or any interests, or rights which the plaintiff might either have or claim to have in the premises; that this defendant ever either dissuaded or attempted to dissuade the plaintiff from either taking or consulting either any counsel, or any one else, regarding either any rights in, or to, either said estate or property; that she ever stated to complainant that she ever understood that there was either an agreement or modified agreement, or any arrangement between said Smith and said plaintiff; that she ever stated that she would carry out either any such arrangement or agreement; that she ever promised anything to the effect that this defendant would take either said property, or any portion thereof, either as the sole legatee or distributee thereof, holding any portion thereof either for the plaintiff or said children, either in trust or otherwise, either on the condition that plaintiff would not consult counsel or enter the Probate Court, or otherwise, or at all; that she promised to account to complainant, either upon complainant's own behalf or that of her children, with respect to any portion of the said property, either after paying the debts of said estate, or otherwise, or at all; that plaintiff ever either believed or had any reason to believe that defendant either represented or agreed to do anything of that sort; that said plaintiff ever either stayed out of said Probate Court on account of either any conversation or promise of this defendant; but alleges that soon after the said plaintiff and her husband came on from California to visit this defendant and, as she is informed, and believes, soon after the first of September, 1907, they investigated the said will pri-

vately to see if it had any provision for them; that they then found that it had not, but learned that said deceased had left the memorandum with a request for the return of the note which this defendant, pursuant thereto, caused to be delivered up to said plaintiff and her said husband, and a receipt taken therefor as aforesaid; that defendant did not herself know that the last will and testament left by Peter B. Smith, which was probated as aforesaid, had been executed by him until after his death and burial; that she caused the same to be probated in the regular course of business, without either any knowledge or information that there was either any claim or pretended claim on any portion of said estate by said plaintiff; that there was never any claim made to her for any portion of said estate, either directly or indirectly, by said plaintiff, except by the suit hereinafter described; that there never has been any conversation had between her and said plaintiff respecting either any such contract or agreement; that the first that this defendant ever knew that there was either any claim or pretended claim, by the plaintiff that she had either in person or trust any interest in said estate other than for the aforesaid note, was long after the estate had been probated and the decree of distribution had been entered in accordance with the will, decreeing all of the property of said deceased to this defendant and long after it was too late for this defendant to make any choice of rejecting said will and claiming all of said estate under the statute, as she is informed and believes she could have done previously; that she is informed and believes that the plaintiff never thought of any such

arrangement as alleged in said complaint until after said decree of distribution had been entered; that the time to appeal from said decree had expired long before the commencement of this action, and it is now conclusive; that if plaintiff had any right or claim in the premises it was barred by not being proven and established in said probate court.

XVII.

Answering the 17th paragraph of said complaint, the defendant admits that the appraised value of the estate which was decreed to her under said will was \$94,876.76, but denies that there was any greater value in said estate, and denies that there was any property not included in said appraisal that belonged to said estate, outside of the note given to said plaintiff as aforesaid, and one item of eight shares of bank stock that were overlooked, and that was substantially the same in value as the mining stocks which were worthless but erroneously appraised in the list as of value.

XVIII.

Answering the 18th paragraph of said complaint, and as a further defense to this whole complaint, defendant denies that any endeavor had been made by the plaintiff, upon any occasion, to obtain from this defendant either any statement or account of the property so received by defendant from said estate; that any request has been made by the plaintiff to the defendant for any accounting; that any demand to turn over any portion of said property has been made by the plaintiff; that any demand has been made by the plaintiff for

either any declaration or trust in either any portion of said property or the whole thereof; that any accounting of either earnings or profits or any income from said property has been made by the plaintiff of this defendant; that any demand for payment, either of any of said property or income or profits thereof, has been made by the plaintiff of the defendant, except only, if at all, such as was made by the plaintiff by the bringing of a certain action brought by her on the 14th day of August, 1908, in the District Court within and for the County of Hennepin and State of Minnesota, a court of general jurisdiction exercising both legal and equitable powers, against this defendant as Marie Dewey Smith, in which action the said plaintiff filed against this defendant a suit of the same nature as this, upon the same alleged cause of action, upon the identical claims made herein as to there being a contract, and a modification of a contract, of the kind attempted to be alleged herein, which complaint was substantially the same as this, with practically no variation except a slight variation as to one or two immaterial dates; that the defendant interposed a demurrer to said complaint upon various grounds, among which was that the said complaint did not state facts sufficient to constitute a cause of action; that that demurrer was brought regularly on before the court for trial and the said court had jurisdiction of the parties, and counsel appeared for both sides, and on behalf of the defendant a judicial admission was made of record to the effect that the alleged contract and alleged modified contract, and the whole thereof, were oral; that the trial court duly entered its order on the 22nd day of January,

1909, sustaining said demurrer in all things, and especially because it decided that the facts did not constitute a cause of action, and gave plaintiff twenty days in which to plead over; that the defendant appealed to the Supreme Court of Minnesota from that decision and failed to prosecute the appeal, after printing the record, and upon motion of the defendant, and by agreement of counsel of record, that court dismissed said appeal and moved the trial court for additional time in which to replead, which motion was denied; that the time to replead in said cause was allowed by plaintiff to go by without any additional pleading, and by reason of the premises and on the merits, the trial court duly made and entered and docketed its judgment of record on the 30th day of June, 1909, sustaining the said demurrer as more fully appears by an exemplified copy of the judgment roll in said action, which is hereto attached and hereby made a part hereof; and this defendant is informed and believes, and by reason thereof alleges, that the said adjudication determined the rights of said parties in said controversy on the merits and that this action is an attempt to violate the rule of *res adjudicata*.

Wherefore, defendant prays that said plaintiff take nothing by this action.

Erskine Wood,
Wood, Montague & Hunt,
Solicitors for Defendant,
Portland, Oregon.

H. V. Mercer,
Counsel for Defendant,
Minneapolis, Minnesota.

State of Minnesota,
County of Hennepin—ss.

Marie Dewey Wallace, being first duly sworn, says that she is the defendant in the above entitled action; that she has read the foregoing answer and knows the contents thereof; that the same is true to her own knowledge, except as to those matters therein stated on information and belief, and as to those matters she believes it to be true.

Marie Dewey Wallace.

Subscribed and sworn to before me this 26th day of September, 1914

(Notarial Seal)

H. V. Mercer,

Notary Public, Hennepin County, Minnesota.

My commission expires May 13, 1916.

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff,

vs.

Marie Dewey Smith,

Defendant.

SUMMONS.

The State of Minnesota to the above named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above entitled action, which complaint is hereto annexed and is here-

with served upon you, and to serve an answer to the said complaint on the subscriber at his office, No. 521 Palace Building, in the city of Minneapolis, in said county and state within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid, the said plaintiff will apply to the said Court for the relief demanded in said complaint.

Dated August 14th, 1908.

J. T. Hutchinson,
Plaintiff's Attorneys,
521 Palace Building,
Minneapolis, Minn.

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff,

vs.

Marie Dewey Smith,

Defendant.

COMPLAINT.

Plaintiff alleges:

I.

That she is twenty-nine years of age, and is the only child of Lyman Ailes, and Lille D. Ailes, the latter of whom became deceased in June, 1900.

II.

That a long time prior to the 12th day of July, 1893, plaintiff's mother, said Lille D. Ailes was duly

and legally divorced from plaintiff's said father, Lyman Ailes, and on said 12th day of July, 1893, plaintiff's said mother was duly and legally married to one Peter B. Smith, and thereupon, and until the said death of plaintiff's said mother said Peter B. Smith and plaintiff's said mother were husband and wife.

III.

That from the time of the marriage of said Peter B. Smith and plaintiff's said mother until plaintiff's marriage to Donald MacLean, as hereinafter alleged, said plaintiff lived with her mother and her said step-father in their house and home and was a member of their family and at the request of her mother, and her said step-father said plaintiff abandoned, relinquished and gave up the use of the name of Elizabeth M. Ailes and adopted, took up and used the name of Elizabeth M. Smith, and was known to all her friends and acquaintances as Elizabeth M. Smith, and during all the time when plaintiff so lived with her said mother and said step-father, said plaintiff was loved, cherished, cared for, provided for, reared, educated and treated in all respects by her mother as a daughter ought to be treated, and by her step-father in all respects as if she, said plaintiff, were the natural daughter of said Peter B. Smith, and as a daughter should be treated by her father.

IV.

That on the 20th day of February, 1899, said plaintiff and said Donald MacLean were duly and legally married to each other, and on the 8th day of January,

1902, said plaintiff was duly and legally divorced from said Donald MacLean, and on the 21st day of August, 1905, said plaintiff was duly and legally married to Edwin J. Price, and said plaintiff and said Edwin J. Price, ever since said 21st day of August, 1905, have been and they now are husband and wife.

That the issue of the marriage of said plaintiff and said Donald MacLean is two sons, both of whom are living, one named Donald, born on the 8th day of March, 1900, and who is now eight years old, and one named Robert, who was born on the 9th day of July, 1901, and who is now seven years of age.

V.

That in or about the month of October, 1900, the plaintiff, who was then living with and in the house of said Peter B. Smith, and the said Peter B. Smith contracted and agreed with each other as follows, to-wit:

The said plaintiff promised and agreed to remain and live with said Peter B. Smith for and during the remainder of his life time in his house and home and to treat and regard him in all respects for and during the remainder of his life time as though he was her own and natural father, and to love and care for him for and during the remainder of his life time as a natural daughter ought to and should love and care for her father, and to keep and have her said son Donald with her, and with said Peter B. Smith in his house and home for and during the remainder of his, said Peter B. Smith's life time. And to take up and assume all the cares, duties and

responsibilities of a housekeeper for him, said Peter B. Smith, and attend to and perform and discharge all such cares, duties and responsibilities as such housekeeper for said Peter B. Smith for and during the remainder of his, said Peter B. Smith's life time, and to be mistress of the house and home of said Peter B. Smith for and during the remainder of his, said Peter B. Smith's life time, and to do and perform as such housekeeper for said Peter B. Smith, and as such mistress of the house and home of said Peter B. Smith, all things which might, should or would be required of her, said plaintiff, by him, said Peter B. Smith, for and during the remainder of his, said Peter B. Smith's life time, and to do, perform and observe for said Peter B. Smith for and during the remainder of the life time of him, said Peter B. Smith, all things which he, said Peter B. Smith, might, should or would require her, said plaintiff to do, perform or observe in the same manner and to the same extent as though she, said plaintiff, were the natural daughter of the said Peter B. Smith; and the said Peter B. Smith promised and agreed to love and cherish the plaintiff as though she were his own and natural daughter for and during the remainder of his, said Peter B. Smith's life time, and to love and cherish the plaintiff's said son, Donald, as though he, said Donald, was the natural grandson of him, said Peter B. Smith, for and during the remainder of his, said Peter B. Smith's life time, and to furnish and provide a home for the plaintiff and her said son, Donald, with him, said Peter B. Smith, for and during the remainder of his, said Peter B. Smith's life time, and to provide for and satisfy all and every of the wants

and necessities of the plaintiff and her said son, Donald, during the remainder of the life time of him, said Peter B. Smith, and to treat and regard the plaintiff in all respects as though she was his own and natural daughter for and during the remainder of his, said Peter B. Smith's life time, and to treat and regard the plaintiff's said son, Donald, in all respects as though he, said Donald, was the natural grandson of him, said Peter B. Smith, for and during the remainder of his, said Peter B. Smith's life time, and to give, devise and bequeath to the plaintiff at his death the whole and entire estate of which he should die possessed, and in and by his, said Peter B. Smith's, last will and testament to make the plaintiff the sole and only heir, devisee and legatee of him, said Peter B. Smith.

VI.

That under and pursuant to the said contract and agreement, the said plaintiff forthwith, upon the making thereof, entered upon the full, due and proper doing, performing and observation of all things by her to be done and performed under said contract and agreement, and continued to fully, duly and properly do, perform and observe all things by her to be done, performed and observed under said contract until a short time after the marriage of said Peter B. Smith and the defendant as hereinafter alleged, and under and pursuant to said contract and agreement the said Peter B. Smith forthwith upon the making thereof entered upon the full, due and proper doing, performing and observation of all things by him to be done, performed and observed under said

contract and agreement and continued to do, perform and observe all things by him to be done, performed and observed under said contract and agreement until a short time after the marriage of said Peter B. Smith and the defendant as hereinafter alleged.

VII.

That in or about the month of June, 1902, said Peter B. Smith, and defendant were duly married to each other, and thereupon and until the death of said Peter B. Smith, as hereinafter alleged, he, said Peter B. Smith, and the defendant were husband and wife.

VIII.

That a short time after the said marriage of said Peter B. Smith, and the defendant, the said defendant dismissed and discharged said plaintiff from her position as his housekeeper, and dismissed and discharged her from her position as mistress of his house and home, and placed and installed the defendant in the stead of this plaintiff, and thereupon the said contract and agreement mentioned and set forth in the fifth paragraph of this complaint was by mutual consent of the parties hereto changed, altered, modified and abrogated in part, and in this, and as follows, to-wit:

The said plaintiff then promised and agreed to release and absolve, and did then release and absolve the said Peter B. Smith from his promise and agreement to furnish and provide a house and home for her, and her son Donald with him, said Peter B. Smith, for and dur-

ing the remainder of his, said Peter B. Smith's lifetime, and from his promise to keep and maintain the plaintiff as his housekeeper and as the mistress of his house and home for and during the remainder of his, said Peter B. Smith's lifetime, and from his promise to give and bequeath to her, said plaintiff, his whole and entire estate at the death of him, said Peter B. Smith, and from his promise in and by his last will and testament to make her, said plaintiff, his sole and only heir, devisee and legatee, and the said Peter B. Smith then promised and agreed with plaintiff to allow and permit her, the plaintiff, to go wherever she might wish to go, and to reside wherever she might wish to reside, and to do whatever she might wish to do, and to take her children with her wherever she might go, if she desired to do so, and to support and maintain said plaintiff and her sons as long as he, Peter B. Smith, should live, and to provide plaintiff with such sums of money from time to time as might or should be necessary for the maintenance and support of herself and her children and to give, devise and bequeath at his death to the plaintiff one-third of his whole and entire estate for herself, and an additional one-third of his whole and entire estate to her for the use and benefit of her said sons, Donald and Robert.

IX.

That on the 10th day of January, 1906, the said Peter B. Smith made and executed his last will and testament wherein and whereby he gave, devised and bequeathed to the defendant all property, real, personal and mixed of which he might die possessed, and wherein and whereby

he named the defendant his sole and only heir, devisee and legatee and wherein and whereby he duly made, nominated and appointed said defendant sole and only executrix of his said last will and testament, and of all his said estate, and on the 16th day of August, 1907, the said Peter B. Smith died.

X.

That on the 27th day of August, 1907, said defendant duly offered the said last will and testament of said Peter B. Smith, deceased, for probate in and by the Probate Court of said Hennepin County and duly petitioned said Probate Court for the admission and allowance thereof for probate, and on the 23rd day of September, 1907, said Probate Court duly made and filed its order therein admitting and allowing said last will and testament for probate and granting letters testamentary to said defendant as sole executrix of the said last will and testament, and defendant on said last named day duly qualified as sole executrix of the said last will and testament of said Peter B. Smith, deceased, and entered upon the performance of her duties as such sole executrix and continued to perform the duties of her said office and to act as such sole executrix of said last will and testament until said estate of said Peter B. Smith, was fully probated, administered and wound up and until said defendant was duly discharged as such sole executrix of said will by said Probate Court by an order of said Court, made and filed therein on the 12th day of March, 1908.

XI.

That the said Peter B. Smith died possessed of the personal property hereinafter named, mentioned and described, each item of which was inventoried and appraised, and estimated to be of the value set opposite it herein, by appraisers duly appointed, qualified and acting in said Probate Court:

Furnishing and household goods of the value	
of	\$ 500.00
40 shares, stock in Royal Milling Co.....	4,000.00
170 shares, stock in Washburn-Crosby Co...	39,100.00
54 shares in Imperial Elevator Co.....	5,400.00
20 shares, stock in St. Anthony Elevator Co.	1,000.00
224 shares, stock in St. Anthony & Dakota	
Elevator Co.	35,168.00
24 shares, stock in Kalispell Mining Co.....	2,500.00
100 shares, stock in Belen Mining Co.....	1,000.00
1,650 shares, stock in Hubbard-Elliott Cop-	
per Mining & Development Co.....	16.50
500 shares, stock in Minneapolis Copper	
Development Co.	5.00
1 Membership, Minneapolis Chamber of	
Commerce	3,000.00
1 Life Insurance Policy in Mutual Life In-	
surance Co., N. Y.....	4,690.00
1 Life Insurance Policy in the Northwestern	
National Life Insurance Co.....	1,649.00
<hr/>	
In all, of the appraised value of.....	\$98,028.50

But the said plaintiff avers and alleges upon infor-

mation and belief, and charges the fact to be that each item of said personal property hereinbefore described was at the time of its appraisement and ever since has been, and now is of far greater value than the sum at which it was appraised by said appraisers, and plaintiff further avers and alleges upon information and belief, and charges the fact to be that said personal property hereinbefore described, and of which said Peter B. Smith died possessed, was not and is not all the property and estate of which said Peter B. Smith died possessed, and plaintiff further avers and alleges upon information and belief, and charges the fact to be that said Peter B. Smith, deceased, died possessed of a large amount of personal property other than, and different from the personal property hereinbefore mentioned and described, and that the defendant has converted and appropriated all of said personal property so being other than, and different from the personal property hereinbefore mentioned and described, as aforesaid, to her own use; and plaintiff further alleges and avers that she does not know, and has not means of ascertaining of what such personal property so being other than, and different from the said personal property hereinbefore described consisted, and consists, and does not know, and has no means of ascertaining the value thereof, but plaintiff alleges upon information and belief, and charges the fact to be that the said personal property so being other than and different from the personal property hereinbefore mentioned and described, as aforesaid, and which was converted by the defendant to her own use, as aforesaid, was at the time of the death of said Peter B.

Smith, and was at the time it was so converted, and that it now is of about the value of One Hundred and Fifty Thousand Dollars (\$150,000.00) and that the whole and entire estate of which said Peter B. Smith died possessed, was, and is of the value of about Two Hundred and Fifty Thousand Dollars ¹(\$250,000.00).

XII.

That prior to the death of said Peter B. Smith, he, and the said defendant entered into an agreement and understanding wherein and whereby it was understood and agreed by and between said Peter B. Smith and said defendant that said Peter B. Smith should devise and bequeath the whole and entire estate of which he should die possessed to said defendant, and that after his, said Peter B. Smith's last will and testament had been fully probated, and his estate fully administered, wound up and distributed to the defendant under the last will and testament of him, said Peter B. Smith, she, the said defendant should give, assign and convey to the plaintiff for plaintiff's own use, and benefit one-third of the property distributed to her, said defendant, under said last will and testament, and received by her, said defendant, from and out of said estate, and should give and assign to the plaintiff for the use and benefit of plaintiff's said sons, Donald and Robert, an additional one-third of all the property distributed to her, said defendant, under the said last will and testament and received by her, said defendant, from and out of said estate.

XIII.

That long prior to the death of said Peter B. Smith,

said defendant well knew each and every one of the terms, conditions and provisions of the contract and agreement between plaintiff and said Peter B. Smith, mentioned, set forth, and alleged in the fifth paragraph of this complaint, and likewise well knew each and every one of the terms, conditions and provisions of the contract and agreement between said Peter B. Smith and the plaintiff which are mentioned, set forth and alleged in paragraph eight of this complaint, and in or about the month of September, 1907, and while the said estate of said Peter B. Smith, deceased, was being administered and before the time defendant had been discharged as sole executrix of the last will and testament of said Peter B. Smith, deceased, and of the estate of said Peter B. Smith, deceased, by the said Probate Court of Hennepin County, the said plaintiff stated to the defendant the substance of the contract set forth and alleged in paragraph five of this complaint, and the substance of the contract set forth and alleged in paragraph eight of this complaint, and that she, the said plaintiff, intended to take some action to enforce her claims upon and against the said estate of said Peter B. Smith, deceased, and thereupon, and in answer to the said statement of plaintiff, the defendant stated to plaintiff that she, said defendant, well knew all about the said contract mentioned and set forth in paragraph five of this complaint and well knew all about the said contract mentioned and set forth in paragraph eight of this complaint, and that she, said defendant, and said Peter B. Smith, during the life of said Peter B. Smith had frequently talked about said contracts so mentioned and set forth in the fifth and

eighth paragraphs of this complaint, respectively, and that it had been agreed and understood between said defendant and said Peter B. Smith during the lifetime of him, said Peter B. Smith, that she, said defendant, should take the said estate of Peter B. Smith in trust under the said last will and testament of said Peter B. Smith, and under an agreement with said Peter B. Smith that after his death, and after his said last will and testament should be fully probated, and after his estate should be fully administered, wound up and distributed to her, said defendant, she, said defendant, should give to the plaintiff for plaintiff's own use and benefit one-third of the whole and entire estate of said Peter B. Smith, which should be distributed to her, said defendant, and an additional one-third of the whole and entire estate of said Peter B. Smith which should be distributed to her, said defendant, for the use and benefit of plaintiff's sons, Donald and Robert, and that plaintiff need do nothing to enforce any claims which she, said plaintiff had against said estate, and that she, said defendant, would carry out and fulfil the agreement and understanding made and entered into between defendant and said Peter B. Smith, as hereinbefore in this paragraph of this complaint fully alleged and set forth, and the said plaintiff relying upon the said statement of the defendant refrained, and has ever since hitherto refrained from taking any steps or instituting any proceedings whatever, in any court whatever, or otherwise to enforce and establish her said claims against said estate of said Peter B. Smith, deceased, while said estate was being administered and prior to the discharge of the defend-

ant as sole executrix of the said last will and testament of said Peter B. Smith, deceased.

XIV.

That on the 12th day of March, 1908, after all of the charges, costs, fees and expenses in and for and about the administration of said estate had been fully paid and satisfied, and the state inheritance tax on said estate had been likewise paid and satisfied, there was left and remained in the hands of said defendant, as sole executrix of the said estate, of Peter B. Smith, deceased, property and effects of said estate which had been accounted for by said defendant as such sole executrix, as aforesaid, to the said Probate Court of the appraised value of \$94,876.76, and on said 12th day of March, 1908, said Probate Court duly made and filed its final order of distribution in the matter of said estate wherein and whereby said Probate Court duly distributed to defendant, as sole heir, legatee and devisee, under said last will and testament, all and the whole of said property so accounted for by said defendant as such sole executrix of said will, and which was of the appraised value of \$94,876.76, as aforesaid, but defendant has refused, and still refuses to execute the said trust so created by said Peter B. Smith, as aforesaid, and has refused and still refuses to give, assign and convey to the plaintiff for her own use and benefit one-third of all of the property distributed to her, said defendant, as sole heir, legatee and devisee under said last will and testament of said Peter B. Smith, by said Probate Court as aforesaid, or any part or portion thereof, although plaintiff has duly de-

manded same, and defendant has likewise refused, and still refuses to give, assign and convey to plaintiff for the use and benefit of plaintiff's said sons, Donald and Robert, an additional one-third of all the property distributed to her, said defendant, as sole legatee and devisee under said last will and testament of Peter B. Smith by said Probate Court, as aforesaid, or any part or portion thereof, although plaintiff has duly demanded same.

XV.

Wherefore, plaintiff prays that defendant be required to render to the said District Court a full, complete, true and correct account of each item of property and of all of the property of which said Peter B. Smith, deceased, died possessed, and of the profits and increase thereof, and for a judgment and decree of said District Court.

1st. Adjusting, decreeing and declaring that defendant was a trustee, and as such received all the property of which said Peter B. Smith, deceased, died possessed.

2nd. Adjudging, decreeing and declaring that as such trustee defendant took and now holds one-third of all the property of which said Peter B. Smith died possessed, together with the profits and increase thereof, less the costs, charges, fees and expenses of administering so much thereof as was administered, and the state inheritance tax thereon for the plaintiff.

3rd. Adjudging, decreeing and declaring that as such trustee, defendant took and now holds an additional

one-third of all the property of which said Peter B. Smith died possessed, together with the profits and increase thereof, less the costs, charges, fees and expenses of administering so much thereof as was administered, and the said inheritance tax thereon for the plaintiff for the use and benefit of her said sons, Donald and Robert.

4th: Adjudging and decreeing, and declaring the value of all the property of which said Peter B. Smith died possessed.

5th. Adjudging, decreeing and declaring that the one-third interest of the plaintiff and the additional one-third interest of her said sons, Donald and Robert, be a specific lien upon all the property of which said Peter B. Smith, deceased, died possessed, and upon all the profits and increase thereof now remaining and being in the hands of said defendant.

6th. Adjudging, decreeing and declaring an apportionment of all the property of which said Peter B. Smith died possessed, and of all the accrued profits and increases thereof, according to the value of said property and according to the value of said increases and profits.

7th. That defendant give and convey to plaintiff one-third of all the property of which said Peter B. Smith died possessed, together with the profits and increase of such one-third for her own use and benefit.

8th. That defendant give and convey to the plaintiff for the use and benefit of her said sons, Donald and

Robert, an additional one-third of all the property of which said Peter B. Smith died possessed, together with the profits and increases of such additional one-third.

9th. For such other and further relief as the Court may seem proper.

10th. For plaintiff's costs and disbursements herein.

J. T. Hutchinson,
Plaintiff's Attorney,
521 Palace Building,
Minneapolis, Minn.

State of Minnesota,
County of Hennepin—ss.

Elizabeth M. Price, being first duly sworn deposes and says that she is the plaintiff in the foregoing within entitled action; that she has heard read the foregoing complaint and knows the contents thereof, that the same is true to her own knowledge except as to such matters as are therein stated on information and belief, and as to such matters she believes it to be true.

Elizabeth M. Price.

Subscribed and sworn to before me, a Notary Public, this 14th day of August, 1908.

(Seal)

J. T. Hutchinson,

Notary Public, Hennepin County, Minnesota,

My commission expires May 12th, 1909.

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff,

vs.

Marie Dewey Smith,

Defendant.

NOTICE OF MOTION.

To Messrs. Wilson and Mercer, Attorneys for above
named Defendant:

You will please take notice that at a special term of the above named Court to be held at the Court House in the City of Minneapolis in said County of Hennepin and State of Minnesota, on Saturday, the 19th day of September, 1908, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, application will be made to said Court for an order thereof striking out the defendant's demurrer to the plaintiff's complaint herein.

Said motion will be made upon the ground that said demurre is sham and frivolous, and that it was not interposed in good faith, but merely for purposes of delay and other improper purposes.

Said motion will be based upon the complaint herein and upon the demurrer thereto heretofore served.

You will further please take notice that if the said Court shall grant the above motion, application will thereupon be made to said Court for an order thereof, directing the clerk to place the said action upon the

general September, 1908 calendar of the above named Court for trial for such day as the same would have been placed on said calendar for trial by said clerk if issue had been joined in said action on the fourth day of September, 1908.

Said last above mentioned motion will be made on the ground that the demurrer to plaintiff's complaint heretofore interposed by said defendant in said action is sham and frivolous, and that the same was not interposed in good faith, but merely for purposes of delay and other improper purposes.

Said last above mentioned motion will be based upon the complaint herein and the demurrer to said complaint heretofore served, and upon the order of the Court striking out said demurrer if the Court shall make such last mentioned order.

Dated September 11th, 1908.

J. T. Hutchinson,
Plaintiff's Attorney,
521 Palace Building.

Endorsed on Back: 105845. State of Minnesota, County of Hennepin, District Court. Elizabeth M. Price, Plaintiff, vs. Marie Dewey Smith, Defendant. Notices of Motion. Due and personal service of the within notices is hereby admitted this 11th day of September, A.D. 1908., Attorneys for Defendant. Filed September 17th, 1908, A. E. Allen, Clerk, by T. S. Cady, Deputy. J. T. Hutchinson, Attorney for Plaintiff.

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff,

vs.

Marie Dewey Smith,

Defendant.

Sirs: You will please to take notice, that the issue of law in the above entitled action will be brought on for hearing at the special term of the District Court to be held in and for the County of Hennepin, at the Court House, in the City of Minneapolis in said County, on the 19th day of September, A.D. 1908, at the opening of said Court on that day, or as soon thereafter as counsel can be heard.

Dated September 11th, 1908.

Yours respectfully,

J. T. Hutchinson,

Attorney for Plaintiff.

To Messrs. Wilson & Mercer,

Attorneys for Defendant.

Endorsed on Back: 105845—District Court, Fourth Judicial District, County of Hennepin. Elizabeth M. Price vs. Marie Dewey Smith. Notice of trial. Due service of the within notice is hereby admitted this 11th day of September, 1908., Attorneys for Defendant. T. Hutchinson, Attorney for Plaintiff. Filed September 17th, 1908. A. E. Allen, Clerk, by T. S. Cady, Deputy.

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff,

vs.

Marie Dewey Smith,

Defendant.

DEMURRER.

Comes now the defendant in the above entitled action and demurs to the complaint of the plaintiff herein upon the grounds that it appears therefrom:

1. That this Court has no jurisdiction of the subject of the action.

2. That the plaintiff has not legal capacity to sue.

3. That there is a defect of parties plaintiff in that Donald MacLean should be made a party plaintiff therein.

4. That the facts stated in said complaint do not constitute a cause of action.

Wilson & Mercer,

Attorneys for Defendant.

Lancaster & McGee,

Of Counsel.

Endorsed on Back: 105845—State of Minnesota, County of Hennepin, District Court. Elizabeth M. Price, Plaintiff, vs. Marie Dewey Smith, Defendant. Demurrer. Due and personal service of the within.

demurrer admitted this 4th day of September, 1908. J. T. Hutchinson, Attorney. Wilson & Mercer, Attorneys for Defendant, Minneapolis. Filed: January 22nd, 1909. A. E. Allen, Clerk, by T. S. Cady, Deputy.

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff,

vs.

Marie Dewey Smith,

Defendant.

ORDER.

The above entitled action came on for argument upon the demurrer to the complaint filed herein before the undersigned, as a judge of the above named Court, on the 21st day of January, 1909, A. M. Higgins, Esq., and H. G. Spalding, Esq., appeared as counsel for the plaintiff, and Messrs. Lancaster & McGee, and Messrs. Wilson & Mercer as attorneys for the defendant; at the beginning of the argument it was admitted in open court by counsel for the plaintiff for the purpose of this demurrer only that the contract alleged in paragraph 5, and the modification thereof alleged in paragraph 8, and the agreement alleged in paragraph 12 and the agreement alleged in paragraph 13, were each and all oral and should be so treated, in disposing of the demurrer; upon hearing and considering the argument of counsel and being fully advised in the premises,

It Is Therefore Ordered, That the said demurrer be, and the same is hereby in all things sustained, and that

the plaintiff, if so advised, may within twenty days from this date file an amended complaint.

Fredk. V. Brown,
Judge.

Dated Jan. 22nd, 1909.

Endorsed on Back: 108845—State of Minnesota, County of Hennepin, District Court. Elizabeth M. Price, Plaintiff, vs. Marie Dewey Smith, Defendant, Order. Due and personal service of the within admitted this day of, 190, Attorney . . . Wilson & Mercer, Attorneys for Defendant. Minneapolis. Filed: January 22nd, 1909. A. E. Allen, Clerk, by T. S. Cady, Deputy.

State of Minnesota,
County of Mennepin—ss.

J. K. Simer being first duly sworn, upon oath deposes and says, that at the City of Minneapolis, in said County and State, 1909, he served the within notice of order and order upon H. G. Spaulding, one of the attorneys for plaintiff therein named, personally, by leaving a true and correct copy of the same in the office and upon the desk of the said H. G, Spaulding in the New York Life Building, during business hours on January 18th, 1909.

Jerome K. Simers.

Subscribed and sworn to before me this 18th day of June, 1909.

(Notarial Seal.)

H. V. Mercer,

Notary Public Hennepin County, Minnesota.

My commission expires May 3rd, 1916.

Elizabeth M. Price,

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff,

vs.

Marie Dewey Smith,

Defendant.

NOTICE OF ORDER.

To Elizabeth M. Price, and H. G. Spaulding, T. J.
Hutchinson, and A. M. Higgins, her Attorneys:

Please take notice that the above named Court made
and filed its order herein, at 12 o'clock, noon, this date,
a copy of which order is hereto attached.

Lancaster, McGee and Wilson & Mercer,
Attorneys for Defendant.

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff,

vs.

Marie Dewey Smith,

Defendant.

ORDER.

The above entitled matter came on to be heard on an
order dated the 17th day of June, 1909, requiring the
defendant to show cause on the 18th day of June, 1909,
why an extension of time should not be granted to the

plaintiff within which she might amend her complaint. H. G. Spalding, Esq., appeared as attorney for the plaintiff in support of said motion, and Messrs. Lancaster & McGee and Messrs. Wilson & Mercer as attorneys for the defendant in opposition thereto, and upon hearing the arguments of counsel, and upon all the files and records herein it appearing to the satisfaction of the Court that the interests of justice do not require the granting of such time, therefore, it is ordered:

That the said application be, and the same hereby is, in all things denied, and the order to show cause with the stay therein granted in all things discharged by the Court.

H. D. Dickinson,
Judge.

Dated June 18th, 1909.

Endorsed on Back: State of Minnesota, County of Hennepin, District Court. Elizabeth M. Price, Plaintiff, vs. Marie Dewey Smith, Defendant. Notice of Order. Filed: June 18th, 1909. A. E. Allen, Clerk, by Geo. H. Hemperley, Deputy. Lancaster & McGee and Wilson & Mercer, Attorneys for Defendant.

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff,

vs.

Marie Dewey Smith,

Defendant.

ORDER TO SHOW CAUSE.

Upon reading and filing the hereto annexed affidavits of Arthur M. Higgins and, verified the 17th day of June, 1909, it is hereby

Ordered, That the defendant herein show cause before this Court at its chambers in the Court House in the City of Minneapolis, State of Minnesota, on the 18th day of June, 1909, 10 o'clock A. M., of said day, or as soon thereafter as counsel can be heard, why an order should not be made giving the plaintiff herein twenty days from and after said day within which to prepare and serve upon the attorneys for the said defendant her amended complaint herein. And it is further

Ordered, that service of this order upon the attorneys for the said defendant shall be deemed sufficient if made on or before 5 o'clock, P. M., of the day of the date hereof; and that all proceedings upon the part of the said defendant be, and the same hereby are, stayed until the hearing and determination hereon.

Dated, Minneapolis, June 17th, 1909.

By The Court,

Horace D. Dickinson, Judge.

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff,

vs.

Marie Dewey Smith,

Defendant.

State of Minnesota,
County of Hennepin—ss.

Arthur M. Higgins, being duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above entitled cause; that a demurrer to the complaint was interposed by the defendant, and a hearing had thereon, and said demurrer was sustained, with leave to the plaintiff to file an amended complaint; that before the time for serving said amended complaint had expired, affiant caused an appeal to the Supreme Court to be perfected, and an appeal was so perfected from the order sustaining said demurrer, before the expiration of the time within which plaintiff was allowed by the order of court to serve her amended complaint; that after said appeal was so perfected affiant concluded that the said complaint should be amended whether the Supreme Court should hold that the said complaint was demurrable or otherwise, and that a hearing on said appeal would serve no good purpose, and for said reason affiant caused the said appeal to be dismissed. That application was made to the Supreme Court, at the hearing on application for dismissal, for additional time within which to prepare and serve an amended complaint, and said court held that such application should be made to the trial court.

Affiant further says that a remittitur was in said cause returned by the Supreme Court and filed in the office of the clerk of this court, on the 17th day of June, 1909.

This affidavit is made as the basis of an application to this court for an extension of time within which plaintiff shall make and serve her amended complaint herein. The time remaining is one day from and after the filing of the remittitur herein, and affiant is now and will be for some days to come actually engaged in the trial of a case in the United States Circuit Court in Saint Paul, before Judge Morris.

Affiant states further that the reason why the amended complaint is not already prepared is that for the last four weeks affiant has been engaged constantly in the actual trial of cases in this Court, that the facts in this case are of peculiar difficulty and require careful thought and study of the authorities in determining the exact theory upon which the complaint should be framed, and that affiant wishes to determine this matter personally in order to draw a proper complaint.

Affiant further states that an extension of the time for amending the complaint herein will not delay the trial of this action, for the reason that under no circumstances could the trial possibly come off until more than three months from this date.

Finally, affiant states that there are cases pending in this court which affiant expects to try during the next two weeks, the preparation and trial of which will take up almost all of his time during that period; and therefore asks for an extension of twenty days from and after the return day of this order to show cause

herein, during which to prepare and serve the plaintiff's amended complaint.

Arthur M. Higgins.

Subscribed and sworn to before me on this 17th day of June, 1909.

(Notarial Seal.)

Maud Goldsbury,

Notary Public, Hennepin County, Minnesota,

My commission expires April 27th, 1915.

Endorsed on Back: State of Minnesota, County of Hennepin, District Court, Fourth Judicial District. Elizabeth M. Price, Plaintiff, against Marie Dewey Smith, Defendant. Affidavits and Order to Show Cause. Original. J. T. Hutchinson, A. M. Higgins, Plaintiff's Attorneys, 701 New York Life Bldg., Minneapolis, Minn.

In the District Court, Fourth Judicial District, for the State of Minnesota, County of Hennepin.

Elizabeth M. Price,

Plaintiff and Appellant,

vs.

Marie Dewey Smith,

Defendant and Respondent.

AFFIDAVIT.

State of Minnesota,

County of Hennepin—ss.

H. V. Mercer, being first duly sworn, deposes and says:

1. That the counsel for respondent herein granted

to counsel for appellant until and including the 3rd day of June, 1909, to file their brief in the Supreme Court; that the reason defendant did not move the dismissal of the appeal sooner was that said Higgins promised affiant on two occasions that if the case could stand they would know before the day of argument what amendments, if any, they wished to make and have them ready for service without asking time; that affiant repeatedly told said Higgins to do so if he wished to amend, as counsel for defendant had been instructed not to grant more time; that he is informed and believes, and upon that information and belief states, that the plaintiff has a father and one husband, and one ex-husband, all living.

2. That no brief was filed herein by counsel for appellant and that he has repeatedly called the attention of A. M. Higgins to the matter and requested that they dispose of the case, and not have it indefinitely hanging.

3. That at one time said Higgins sent to counsel for respondent a stipulation in effect asking them to dismiss the appeal and grant them time in which to amend their complaint, but said Higgins had previously told affiant that he did not think they could make the complaint any stronger than they had it, and if they could not win on this complaint they could not win at all.

4. That affiant returned said stipulation to said Higgins and asked him to take whatever proceedings he thought were necessary, as the case was one which ought to be pushed, and counsel for respondent did not feel that it ought to be left standing, or that they should at

such late date do anything that would prejudice respondent's rights.

5. That on May 6th, 1909, counsel for respondent, through affiant, wrote the following letter to said Higgins:

“Dear Sir:

“We do not find that you have dismissed the case of Price vs. Smith on appeal, and we suppose that you intend to do so as we have received no brief within the time specified and have not received any yet.

“It is, of course, too late for you to expect us to accept a brief now for this appeal. Unless we hear from you by return mail we shall have to take proceedings to dismiss the appeal.”

6. That a day or two after that affiant met said Higgins and he said that they would dismiss the appeal and amend over as they had a day or so in which to amend, and promised to get the matter out of the way before the case was called for June 2nd.

7. That on May 31st affiant saw said Higgins and asked him to dispose of the matter, and he finally promised that he would do so before the case was called by service of a dismissal of the appeal; that on June 1st the office of the Clerk of the Supreme Court called the office of Wilson & Mercer and notified them that the said cause stood as for argument and that no briefs were filed; that affiant immediately sent a messenger to hunt up said Higgins and was notified by telephone by said

messenger that said Higgins said he would not dismiss the case, but would ask the court to have it continued over the term.

8. That on the 31st day of May, 1909, when affiant spoke to said Higgins about said matter, said Higgins asked to have that done, instead of dismissing the appeal, and affiant told him he could not consent to it.

9. That respondent was compelled to and did move the dismissal of said cause, because she could not get the same prosecuted by appellant; that the defendant wants to close up all her affairs here and depart from this state and not be annoyed by this sort of litigation; that the firm of Wilson & Mercer probated the estate of said P. B. Smith and never heard of any such claim as is here advanced during that probation, and have never been able to find any evidence of any such claim as is set forth in said complaint.

H. V. Mercer.

Subscribed and sworn to before me this 18th day of June, 1909.

Notary Public, Hennepin County, Minnesota,
(Notarial Seal) Jerome K. Simers,

My commission expires May 17th, 1916.

Endorsements on Back: 105845—State of Minnesota, County of Hennepin, District Court. Elizabeth M. Price, Plaintiff, vs. Marie Dewey Smith, Defendant. Affidavit. Wilson & Mercer, Attorneys for Defendant, Minneapolis. Filed, June 18, 1909, A. E. Allen, Clerk, by T. S. Cady, Deputy.

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff,

vs.

Marie Dewey Smith,

Defendant.

ORDER.

The above entitled matter came on to be heard on an order dated the 17th day of June, 1909, requiring the defendant to show cause on the 18th day of June, 1909, why an extension of time should not be granted to the plaintiff within which she might amend her complaint; H. G. Spalding, Esq., appeared as attorney for the plaintiff in support of said motion, and Messrs. Lancaster & McGee and Messrs. Wilson & Mercer, as attorneys for the defendant in opposition thereto, and upon hearing the arguments of counsel, and upon all the files and records herein it appearing to the satisfaction of the court that the interests of justice do not require the granting of such time, therefore,

It is Hereby Ordered, that the said application be, and the same hereby is, in all things denied, and the order to show cause with the stay therein granted in all things discharged by the court.

Horace D. Dickinson,

Judge.

Dated June 18, 1909.

Endorsements on Back: State of Minnesota,
County of Hennepin, District Court. Elizabeth M.

Price, Plaintiff, vs. Marie Dewey Smith, Defendant.
Order. Filed, June 18, 1909, A. E. Allen, Clerk, by
Geo. H. Hemperley, Deputy. Lancaster & McGee
and Wilson & Mercer, Attorneys for Defendant, Min-
neapolis

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff,

vs.

Marie Dewey Smith,

Defendant.

NOTICE OF TAXATION OF COSTS.

To Elizabeth M. Price and H. G. Spalding, J. T.
Hutchinson and A. M. Higgins, her attorneys:

Please take Notice, that on the 26th day of June,
1909, at ten o'clock A. M., application will be made to
A. E. Allen, Esq., Clerk of said Court, at his office in
the Court House in the City of Minneapolis in the
County of Hennepin and State of Minnesota, to have
the bill of costs and disbursements heretofore served and
filed herein, a copy of which is hereto attached and
hereby made a part hereof, taxed and inserted in the
judgment then and there to be entered therein.

Dated June 23, 1909.

Yours respectfully,

Wilson & Mercer,
Attorneys for Defendant.

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff,

vs.

Marie Dewey Smith,

Defendant.

AMOUNT CLAIMED IN SUMMONS.

Principal	\$
Interest	

DEFENDANT'S COSTS AND DIS-
BURSEMENTS.

Statutory Costs	\$5.00
Two Affidavits50
Sheriff's Fees	
Clerk's Fees, to be added.....	2.00
	<hr/>
	\$7.50

The above Bill of Costs and Disbursements taxed
and allowed at \$7.50.

Dated June 30th, 1909.

A. E. Allen, Clerk

By Fred S. Cady, Deputy.

State of Minnesota,
County of Hennepin—ss.

H. V. Mercer, being first duly sworn, deposes and
says that he is one of the attorneys of the defendant in

the above entitled cause; that the foregoing is a true and correct statement of the costs and disbursements of said defendant; in the above entitled proceeding, and that all of the items thereof have been actually and necessarily paid or incurred therein by and on behalf of said defendant.

H. V. Mercer.

Subscribed and sworn to before me, this 18th day of June, 1909.

(Notarial Seal)

J. K. Simer,

Notary Public, Hennepin County, Minnesota.

My commission expires May 17th, 1916.

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff.

vs.

Marie Dewey Smith,

Defendant.

State of Minnesota,
County of Hennepin—ss

H. V. Mercer, being first duly sworn, deposes and says that he is one of the attorneys for the defendant in the above entitled action; that the Notice of Order sustaining defendant's Demurrer in said action was duly served upon plaintiff therein, on the 22d day of January, 1909, as appears by the return thereon; that more than twenty days have elapsed since the service of said order

sustaining the defendant's Demurrer, and that no amended complaint had been received by the defendant's attorneys in this case, nor has said plaintiff appeared therein, by attorney or otherwise, and defendant prays judgment according to law.

H. V. Mercer.

Subscribed and sworn to before me this 18th day of June, 1909.

(Seal)

J. K. Simer,

Notary Public in and for Hennepin County, Minn.

My commissio nexpires May 17th, 1916.

Endorsements on Back: 105845—State of Minnesota, County of Hennepin, District Court. Elizabeth M. Price, Plaintiff, vs. Marie Dewey Smith, Defendant. Filed June 23, 1909, A. E. Allen, Clerk, by F. S. Cady, Deputy.

Due and personal service of the within Notice admitted this 23d day of June, 1909.

A. M. Higgins,

Attorney for Plaintiff.

State of Minnesota,
County of Hennepin—ss.

J. K. Simer, being first duly sworn, upon oath deposes and says, that at the City of Minneapolis in said County and State, on the 18th day of June, 1909, he served the within Affidavit of Disbursements and No Answer upon H. G. Spaulding, one of the attorneys for plaintiff therein named, personally, by leaving a true and correct copy of the same in the office and

upon the desk of the said H. G. Spaulding in the New York Life Building during business hours on January 18, 1909.

Jerome K. Simer.

Subscribed and sworn to before me this 18th day of June, 1909.

(Seal)

H. V. Mercer,

Notary Public, Hennepin County, Minnesota,

My commission expires May 3, 1916.

In the District Court, Fourth Judicial District, for the State of Minnesota, County of Hennepin.

Elizabeth M. Price,

Plaintiff,

vs.

Marie Dewey Smith,

Defendant.

AMOUNT CLAIMED IN SUMMONS.

Principal	\$
Interest	

DEFENDANT'S COSTS AND DISBURSEMENTS.

Statutory Costs	\$5.00
Two Affidavits50
Sheriff's Fees	
Clerk's Fees, to be added.....	

The above Bill of Costs and Disbursements taxed and allowed at \$.....

Dated June 18, 1909.

....., Clerk.

State of Minnesota,
County of Hennepin—ss.

H. V. Mercer, being first duly sworn, deposes and says, that he is one of the attorneys of the defendant in the above entitled cause; that the foregoing is a true and correct statement of the costs and disbursements of said defendant in the above entitled proceeding, and that all of the items thereof have been actually and necessarily paid or incurred therein by and on behalf of said defendant.

H. V. Mercer.

Subscribed and sworn to before me, this 18th day of June, 1909.

(Seal)

J. K. Simer,

Notary Public in and for Hennepin County, Minn.

(My commission expires May 17th, 1916.)

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff,

vs.

Marie Dewey Smith,

Defendant.

State of Minnesota,
County of Hennepin—ss.

H. V. Mercer being first duly sworn, deposes and says that he is one of the attorneys for the defendant in the above entitled action; that the Notice of Order sustaining defendant's demurrer in said action was duly

served upon the plaintiff therein, on the 22d day of January, 1909, as appears by the return thereon; that more than twenty days have elapsed since the service of said order sustaining the defendant's demurrer, and that no amended complaint has been received by the defendant's attorney in this cause, nor has said plaintiff appeared therein, by attorney or otherwise, and defendant prays judgment according to law.

H. V. Mercer.

Subscribed and sworn to before me, this 18th day of June, 1909.

(Seal)

J. K. Simer,

Notary Public, in and for Hennepin County, Minn.

My commission expires May 17th, 1916.

Endorsements on Back: 105845—District Court, Fourth Judicial District, County of Hennepin. Elizabeth M. Price vs. Marie Dewey Smith. Affidavit of Disbursements and No Answer. Office of Clerk of District Court. Filed June 18, 1909, A. E. Allen, Clerk, by Geo. H. Hemperley, Deputy

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff.

vs.

Marie Dewey Smith,

Defendant.

AFFIDAVIT OF IDENTIFICATION.

State of Minnesota,
County of Hennepin—ss.

H. V. Mercer, being duly sworn, deposes and says that he is one of the attorneys for the defendant in the above entitled action; that to the best of his knowledge, information and belief, the full name of the judgment debtor herein is Elizabeth M. Price, that she has no business so far as this affiant can learn, that her present place of business is at No. Street Avenue., in the City, Town of, County of, State of, and that she resides at 129 Twelfth Street S., in the City Town of Minneapolis, County of Hennepin, State of Minnesota, further deponent saith not.

H. V. Mercer.

Subscribed and sworn to before me this 30th day of June A. D., 1909.

(Seal):

Jerome K. Simer,

Notary Public, Hennepin County, Minnesota.

My commission expires May 17, 1916.

Endorsements on Back: 105485—State of Minnesota, County of Hennepin, District Court, Fourth Judicial District. Elizabeth M. Price, Plaintiff, against Marie Dewey Smith, Defendant. Affidavit of Identification of Judgment Debtor. Filed June 30, 1909. A. E. Allen, Clerk, by F. S. Cady, Deputy.

*In the District Court, Fourth Judicial District, for the
State of Minnesota, County of Hennepin.*

Elizabeth M. Price,

Plaintiff,

vs.

Marie Dewey Smith,

Defendant.

JUDGMENT.

June 30th, 1909.

This cause came on for hearing before the Court on the 21st day of January, A.D. 1909, upon a demurrer to the complaint herein; and the Court, after hearing the arguments of counsel, and being fully advised in the premises, did on the 22nd day of January, A.D. 1909, duly make and file its order, sustaining said demurrer.

Now, pursuant to said order and on motion of Messrs. Wilson & Mercer, and Messrs. Lancaster & McGee, attorneys for defendant, it is hereby adjudged that said demurrer be and the same is hereby in all things sustained, and that the defendant recover of the plaintiff the sum of Seven and 50/100 Dollars, costs and disbursements as taxed and allowed herein.

By The Court.

A. E. Allan,

Clerk of the District Court.

\$7.50 vs. Plaintiff.

By Geo. H. Hemperley,

Deputy.

Endorsed on Back: 105845—State of Minnesota, County of Hennepin, District Court, Fourth Judicial District. Elizabeth M. Price, Plaintiff, vs. Marie D. Smith, Defendant.

Damages	\$
Costs, vs. Plaintiff	7.50
<hr/>	
Total	\$7.50

Judgment Roll—Filed and judgment docketed June 30th, A.D. 1909, at 5 o'clock, P. M. A. E. Allen, Clerk. By Geo. H. Hemperley, Deputy.

In the District Court, Fourth Judicial District, for the State of Minnesota, County of Hennepin.

I, P. S. Neilson, clerk of the above named Court, do hereby certify that I have compared the papers, writing to which this certificate is attached with the original summons and complaint, notice of motion, notice of trial, demurrer, order sustaining demurrer, notice of order, order, dated June 18th, 1909, order to show cause, dated June 17th, 1909, affidavit of Arthur M. Higgins, affidavit of H. V. Mercer, order, dated June 18th, 1909, notice of taxation of costs, affidavit of disbursements and no answer, affidavit of disbursements and no answer, affidavit of identification, and judgment, comprising the judgment roll and the whole thereof, in the action therein entitled, as the same appear of record and on file in the said Clerk's office, at the Court House in said Hennepin County, Minnesota, and find the same to be true and correct copies thereof, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court at the City of Minneapolis, in said County, this 1st day of October, A.D. 1914.

l(Seal)

P. S. Neilson,
Clerk of District Court.

State of Minnesota,
County of Hennepin—ss.

I, Horace D. Dickinson, Presiding Judge of the District Court for the Fourth Judicial District, State of Minnesota, do hereby certify that P. S. Neilson, whose name is subscribed to the foregoing certificate of attestation, is and was at the time of making the same, the Clerk of said District Court, in and for the County of Hennepin, in said State of Minnesota, duly elected and qualified, the keeper of its seal and the custodian of its files and records, and that his official acts are entitled to full faith and credit; that I am well acquainted with the handwriting of said Clerk, and verily believe his signature to said certificate to be genuine, and that said certificate is in due form and by the proper officer.

Witness my hand at the City of Minneapolis, in said County of Hennepin and State of Minnesota, this 1st day of October A. D., 1914.

By Horace D. Dickinson,
Presiding Judge.

State of Minnesota,
County of Hennepin—ss.

I, P. S. Neilson, Clerk of the District Court, Fourth Judicial District, in and for the County of Hennepin,

State of Minnesota, do hereby certify that Honorable Horace D. Dickinson, whose name is subscribed to the foregoing certificate of attestation, is and was at the time of making the same, Presiding Judge of said District Court for the Fourth Judicial District, State of Minnesota, duly elected and qualified, and that his official acts are entitled to full faith and credit; that I am well acquainted with the handwriting of said Judge, and verily believe his signature to said certificate to be genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said District Court at the City of Minneapolis, in said County, this 1st day of October, A. D. 1914.

(Seal)

P. S. Neilson, Clerk.

Due service of the within Answer by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, October 9, 1914.

Wm. H. Hallam,
Attorney for Plaintiff.

Answer filed October 9, 1914. G. H. Marsh, Clerk.

And afterwards, to wit, on Tuesday, the 6th day of July, 1915, the same being the 2nd judicial day of the regular July, 1915, term of said Court; present, the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

FINAL DECREE.

This cause was tried by the Court upon the pleadings, the evidence taken in open Court and the depositions filed herein, and was argued by Mr. William H. Hallam of counsel for the plaintiff, and by Mr. H. V. Mercer and Mr. Erskine Wood, of counsel for the defendant; on consideration whereof, it is ordered, adjudged and decreed that the Bill of Complaint herein be and the same is hereby dismissed and that said defendant do have and recover of and from said plaintiff her costs and disbursements herein taxed at \$97.55.

Chas. E. Wolverton,
Judge.

Filed July 6, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 6th day of July, 1915, there was duly filed in said Court and cause an Opinion, in words and figures as follows, to wit:

OPINION.

Peter B. Smith was, on July 12, 1893, married to Mrs. Lillie D. Ailes; she having been divorced from a former husband. The plaintiff is the daughter of Mrs. Ailes, and was at the time about the age of 14 years. Plaintiff lived with her mother and stepfather until her marriage with Donald MacLean, February 20, 1899. This marriage took place in London, England, the plaintiff having gone abroad on a trip with her own father, Lyman Ailes, and at his expense. MacLean was a surgeon in the United States Army. The issue of the marriage was two sons. Mrs. Smith died June 12, 1900. At

that time the plaintiff and her husband, MacLean, came to live with Smith. MacLean continued the relations for a short time only, when he left, and plaintiff and her sons continued to live with Smith until he was married to the defendant, and for a time thereafter. This marriage was consummated May 14, 1902, at Fargo, N. D. On the day of his marriage to defendant, Smith made and published his last will and testament, whereby he made provision for the plaintiff in the sum of \$5000, referring to her as his adopted daughter, and for her children in the further sum of \$5000, constituting plaintiff and his wife trustees to dispense the fund for their use and benefit. The wife was handed a copy of this will on the day of the marriage and shortly thereafter.

The plaintiff was divorced from MacLean January 9, 1902, the suit therefor having been instituted in the fall of 1901. In August, 1905, at San Jose, Cal., plaintiff was married to Edwin J. Price, who died March 3, 1914. Soon after the marriage Price legally adopted the two sons of plaintiff. From the time of the marriage plaintiff continued to make her home in California with her children, until after the death of Peter B. Smith, which occurred August 16, 1907, when she moved again to Minneapolis, and was a resident of Minnesota at the time of the commencement of this suit. Prior to Smith's decease, to wit, on January 10, 1906, he made and published a second will, revoking all former wills, wherein and whereby he made no mention of plaintiff and her two sons, and gave his entire estate to his wife, the defendant herein, naming her as his sole executrix. This will was caused to be probated by the defendant about August 27,

1907, and the estate was subsequently in due course settled, and the executrix discharged; the plaintiff making no claim in probate against the estate for any share thereof.

On August 14, 1908, the plaintiff instituted a suit against the defendant, in the district court within and for the county of Hennepin, state of Minnesota; the cause being stated in all material respects the same as in the present suit, and demanding like relief. To the bill of complaint the defendant interposed a demurrer, assigning the following reasons: “(1) That this court has no jurisdiction of the subject of the action. (2) That the plaintiff has not legal capacity to sue. (3) That there is a defect of parties plaintiff, in that Donald MacLean should be made a party plaintiff therein. (4) That the facts stated in said complaint do not constitute a cause of action.” After full argument and hearing upon the demurrer, and due consideration, it was ordered by the court “that the said demurrer be and the same is hereby in all things sustained.” Later, and in due course, it was further adjudged that the defendant recover from the plaintiff the sum of \$7.50 costs and disbursements as taxed and allowed.

Now, as cause of suit, briefly stated, the plaintiff alleges that about the month of October, 1900, both before and after the departure of MacLean, Smith offered and proposed to complainant, and upon her assent agreed with her, that if she would make her home with him, and live there as his daughter, and treat and regard him as her own father, and care for him during his declining years, and assume the cares, duties, and responsibilities

of the management of his household, and be his house-keeper thereof in the same manner and to the same extent as though she were his own daughter, he, the said Peter B. Smith, would care for and support the complainant and her children in the same manner as if she were his own daughter and the said children his grandchildren, and would at his death leave and will to complainant, for herself and her children, all the property that he might then own, and that complainant assented to and accepted said proposal and agreed thereto. It is further alleged that plaintiff entered upon and discharged the obligations on her part in every respect until about the month of February, 1902, when the agreement was modified. It is then further alleged that, about the month of February, 1902, Peter B. Smith, being about to contract marriage with the defendant, requested the complainant to consent that said promise and obligation as by the terms of said agreement undertaken upon his part, be modified so as to require him (Smith) to leave and bequeath to complainant, for herself and her two children, two-thirds of the property that he might own at the time of his death—one-third for her own separate use and benefit and one-third for the use and benefit of her children—and to permit him to bequeath one-third of his estate to the defendant, to all of which the plaintiff assented, and thus by mutual consent of the parties to the agreement was accordingly modified. Plaintiff thereupon asserts that she performed upon her part all the conditions of the agreement as so modified, so far as she was permitted so to perform by the said Peter B. Smith. It is then further alleged that, shortly after the

probate of Smith's will, the plaintiff advised the defendant of the agreement and modified agreement existing between plaintiff and Smith at the time of his death, and that defendant then informed plaintiff that it had been understood and agreed between defendant and Smith that Smith should leave by will all of his property to the defendant, but that defendant should take and hold two-thirds of the same in trust for the use and benefit of the complainant and her two children, and that defendant should account to complainant for two-thirds of said property, and that defendant then and there promised and agreed with plaintiff that she would respect, recognize, and protect complainant's said rights and interests, and would take all the property of said estate in her own name and as sole legatee and distributor thereof, but that she would so take and hold two-thirds of said property in trust, and charged and impressed with a trust in favor of complainant and her children, and would faithfully render account accordingly. The estate is a large one, and it is charged that defendant has refused to observe the obligations of the trust, although due demand has been made upon her in that behalf. The prayer demands that defendant be charged as trustee of two-thirds of the estate for the use of plaintiff and her sons, and that she render an account, and such other and further relief as may seem equitable.

WOLVERTON, DISTRICT JUDGE:

It is first urged that the suit and decree following upon the demurrer in the state court in Minnesota is a bar to the present suit. While I am strongly persuaded

that the contention is sound (*Lindsley v. Union Silver Star Min. Co.*, 115 Fed. 46. I am disposed to waive the question and determine the cause solely upon the merits of the controversy. It should be further premised that this is not a suit to disclose an adoption on the part of Peter B. Smith of the plaintiff as his child, and thus to establish her right to a child's portion of his estate as an heir by inheritance, but its theory and purpose is to specifically enforce an agreement to make a will in favor of plaintiff, as subsequently modified, and to declare a trust, with defendant, as trustee, obligated to account to the plaintiff for her use and the use of her two sons to the extent of two-thirds of the estate of decedent. To the issues thus cast in the record we must be confined, and we can determine none other.

Another factor in the inquiry is that the alleged agreement to make a will, and the modification thereof, sought to be enforced, are in parol, and their sufficiency on this account is questioned. I need not stop to inquire as to this. It may be conceded, without inquiring, but without deciding, that such and kindred agreements in parol are legally sufficient to justify their enforcement, but with the qualifications, first, that they must be reasonably definite and certain; second, they must be established by clear, full, and irrefragable evidence; and, third, they must have been performed to such an extent and in such a manner that the beneficiary cannot be properly compensated in damages. *Stellmacher v. Bruder et al.*, 89 Minn. 507; *Richardson v. Richardson*, 114 Minn. 12; *Haubrich v. Haubrich*, 118 Minn. 394; *Robertson v. Corcoran*, 125 Minn. 118. As to whether the trust agree-

ment is also required to be in writing, I *waive* that as well.

When Peter B. Smith married Mrs. Ailes, the plaintiff, being her daughter, became a member of his household, as she naturally would. Smith regarded her as a member of his family. He was fond of her, treated her with parental regard, and cared for her very much, I assume, as he would have cared for his own child. He called her "Bess," as her mother and associates did, and allowed her to take his name, that of Smith, by which she seems generally to have been known. But when she went abroad with her father she resumed the names of Ailes, and traveled with him under that name. It was on this trip that she was married to Donald MacLean, in London. She was then about the age of 20 years, and says she obtained the consent of her mother and step-father to the marriage. She returned with her husband soon to the United States and accompanied him as he was transferred from post to post, but later returned with him to the home of Smith in Minneapolis. The plaintiff affirms that Smith had previously urged her husband to resign from the army, and that he came to Minneapolis, so that he might engage in private practice at that place. The immediate cause, however, for their coming to Minneapolis, was the illness of plaintiff's mother, and before coming MacLean resigned from the army. After the death of her mother, which occurred on June 12, 1900, the day of her arrival in Minneapolis, it was arranged that plaintiff and her husband should live with Smith, that plaintiff should keep house for him, and that her husband should engage in the practice of

medicine. This arrangement continued until October of that year, when trouble arose, which resulted in Dr. MacLean leaving, not only the home of Smith, but the city of Minneapolis, and thence continuing absent therefrom. Plaintiff asserts that her stepfather would not allow her, with her child, to go with her husband. From that time on the plaintiff remained, with her child and one subsequently born, with her stepfather until after his marriage with the present defendant. After Dr. MacLean had left, plaintiff relates that her stepfather insisted on her remaining with him as his daughter and keeping house for him, and that he said to her that she ought to be glad that she was "rid of a man like that," and that he would never be able to take care of the baby and herself as he should do, and that "the sooner I would consent to leave the doctor"—using the language of plaintiff as a witness in her own behalf—"divorce him, make up my mind to give him up entirely, the better it would be for all of us; * * * and he said that if I would give him up entirely, everything he had would be mine when he had gone." To this she relates she did not then assent. She further relates that she frequently had conversations with her stepfather along the same line, and specifying more particularly, she says:

"Well, my dad was disappointed that I still had any thought whatever of going back to the doctor, and in the mornings almost the first thing he would say, he would come in the dining room to the table, and he would say, 'Well, Bess, are you going to give up this man?' I would say, 'No.' And that would perhaps drop. Then he would say another time, 'Have you come to your

senses yet?' He was just continually banging away at me all the time, and saying continually that when I would give up this man, who had proven himself no good, and in no position to take care of the baby and me, everything that he had would be ours. He repeated that over and over and over all during this time. * * * That continued until that fall. I would not consent to give up all thought of the doctor. * * * I meant to say that it continued all that winter, until the following spring. And finally—my health was very, very poor, and finally—I think it was the last of April or the first part of May (this is 1901), I couldn't stand it any longer; I was very miserable and unhealthy; and I said to Dad, 'All right, go ahead and get the divorce.' He did. And then I accepted. Then is when I accepted that I would stay, gave up all thought of going to the doctor, decided that I would stay and make my home the rest of my life, as I thought, there in my home"

Until the time she consented to procure a divorce, she contemplated, when opportunity presented itself, renewing her marriage relations with her husband. On cross-examination touching the same subject, the plaintiff continues:

"Q. You say in your complaint, in effect, that Mr. Smith told you that if you went with Dr. MacLean he would not contribute anything to your support; that is, Mr. Smith would not contribute anything to your support. Is that right? A. Yes. Q. If I understood you correctly awhile ago, in your testimony, you said in effect that Mr. Smith told you that, if you stayed there,

he would do something by you in a property way? A. Yes; if I would divorce the doctor. Q. Did he only say that in connection with his statement that if you would divorce the doctor he would do it? A. I wouldn't say that he used those very words invariably. He would change his way of speaking by saying, 'Well, have you come to your senses, and will give up this man—make up your mind to give him up?' He didn't always use the word 'divorce.' Q. Well, was all of this talk, which you say took place between you and Mr. Smith about what he would do if you did give him up, had before the time when you filed your divorce complaint? A. Not all the talk before. There was talk before I consented to divorce the doctor. Q. Well, was there any talk, about the property arrangement which you have mentioned, after the time when you filed your divorce action, and before the time when you say he announced his engagement to you? A. Well, that was a thing that was more taken for granted; that he had changed very much since I consented to divorce the doctor. He asked if there was anything that he could do. He did everything in his power for me. And when I accepted the conditions, I understood that meant that when I gave up the doctor I should have everything. Q. Well, now, the time when you say you accepted was before you filed the divorce action? A. Yes; at the same time. Q. And if you made any acceptance, then, of what you say was his proposition, it was before you started the divorce action? A. Well, I think that when I started the divorce action was the same time that I accepted this proposition. Q. You don't think it was after that that you accepted it?

A. I should think that the matter of accepting, of divorcing the doctor would be accepted, I should think it would be the same time. * * * Q. Now, how did he put that proposition? I would like to have the exact words, if you can give them. A. I will give the exact words, just as nearly as I can: 'If you will give up this man, I will leave everything I have to you when I am gone.' I think those are very close to the exact words."

Further on she continues:

"Q. Now, the matter of divorcing the doctor was the matter that you and Mr. Smith had talked about at various times, wasn't it? A. Various times. Q. And that came about in the inception because the doctor was not able to support you at that time, didn't it? A. As a general thing. * * * Q. And Mr. Smith advised you that, until the doctor could earn something to support you, you had better stay there and live with him, didn't he? A. No; he didn't put it that way. He forbade me to go, Mr. Mercer. Q. But, as a matter of fact, Mr. Smith told you then, didn't he, that if the doctor got him established some place you could go to him? A. Why, yes; he told me that, I presume, in a way to quiet me. Q. And he told you that a good many times, didn't he, afterwards? A. Yes; but he said, also, that he never expected that he would. Q. Yes; but that if he did, you could go? A. Yes. Q. And he kept that up as long as you didn't apply for the divorce, didn't he? A. Oh, no; he insisted upon my getting a divorce. Almost continuously he was grinding that—that I must divorce the doctor."

And again:

“Now, you never told Mr. Smith at any time until you decided to get a divorce that you would accept any suggestion that he had made, did you, about this matter?

A. I don't think so—speaking always of the idea that I would divorce the doctor. * * *

Q. Do you remember the conversation that took place when you told Mr. Smith that you had decided to get the divorce? Now,

I want exactly the language, if you can give it. A. I

told you I couldn't, Mr. Mercer. Q. Then I want the substance of it, as to what you said and what he said, if you please. A. Well, the substance of it, and the most

important part to my mind, is my saying—I just gave up and said, ‘All right, Dad, go ahead and get the divorce.’

Q. That is all you said? A. I don't say that is all I said. I said that was the important thing. * * *

Q. Up to that time, Mr. Smith had never mentioned the word ‘will’ to you, had he? A. Well, he may have men-

tioned the word ‘will.’ Q. Not in relation to his affairs and yours, did he, the word ‘will’? A. I don't think he

ever—I don't know, but I don't recollect the word ‘will’ exactly. Q. Now, you hadn't mentioned the matter of

his will to him, had you, in the terms of ‘will’? A. I don't think so. Q. As a matter of fact, you never had

discussed with Mr. Smith the question of how he would leave his property, had you, in so many words? A. Only

what he said, that he would leave it all to me. Q. Did he say when he would leave it to you? A. When he

was gone. Q. Did he say he would leave it by will? A. He didn't say ‘will’ that I remember. * * *

Q. As a matter of fact, the question of his making a will, where

the term 'will' was used, was never mentioned between you and Mr. Smith at any time, was it? A. Well, it seems to me that on one occasion, * * * when Dad was making the remark, and insisting that I consent to divorcing the doctor, he made the remark—I can't swear just how this was—that he made the remark that he wished I would make up my mind, so that he could—I don't know whether he used the word 'will' or not—I can't answer that. Q. Now, he never said anything to you, after he was married to the defendant, about leaving you any property? A. No; I don't think the question ever came up."

It will be remembered that divorce proceedings were commenced in the fall of 1901, and a divorce was obtained January 9, 1902.

As to the second alleged agreement, in modification of the first, the testimony is very brief. The next morning after Smith and the defendant had become engaged to marry, plaintiff relates that her step-father advised her of what had happened, and after saying to her that he did not want her to think that any one could ever take her mother's place, and indicating that the new relations would make some difference to her, he said:

"Instead of you having everything I have when I am gone, you will have one-third, and the boys will have one-third, and Dewey (meaning the defendant) will have one-third; but," he said (quoting the further language of witness), "I think we will have enough for all." "That," she says, "was practically all that was said, be-

cause it was rather a tense situation.” “And I said, ‘All right.’ ”

As it pertains to the alleged trust relations on the part of the defendant, the plaintiff testifies that, shortly after her stepfather’s death, she, with her husband, Price, went to Minneapolis, and while there had a conversation with defendant about Smith’s disposition of his property. She says:

“I told her that I had seen the will, and that I was very much surprised that there had been no provision made for me and the children, and further went on to say that I could not understand it—that I couldn’t understand why there was no provision made for myself and the children. . And Dewey said, ‘Yes,’ she was surprised also, and that she knew nothing about it; * * * that she was also surprised; that she knew nothing whatever about the will. But she said she supposed that it had been made that way—it was very short and very brief—for business reasons; and she said she knew I was anxious to get back to my children in California, or else she said she supposed I was anxious—anyhow, that remark came up—and that she knew the agreement, and that I could go back to California and not wait for the will to be probated.

“The Court: What agreement? A. Well, I presumed that she meant the agreement between my dad and I that I was to have one-third and the boys were to have one-third. I took it to mean that, because I was speaking about the will, and said I was surprised that no mention had been made of us, or me. And that I could

go back to California, back to Mill Valley, and she would send our share to us. That was all the conversation."

The cross-examination does not shed further light upon the subject.

In corroboration of plaintiff's cause, W. J. Hartzell testifies that he had a conversation at one time with Smith, probably six months before the marriage of Smith with the present defendant, in which Smith said in effect that he felt toward the children as though they were his own babies, and that he proposed to care for them, and another time after the marriage, in which he said, quoting the testimony:

" 'Bess, of course, is trying to make her own way now, but I have to help her all the time,' and he says, 'I think I will have to arrange a home for them somewhere. But,' he says, 'I expect to take care of them, feel toward them as though they were my own boys, and shall always provide for them.' About that time there were two or three times he consulted with me about the possibility of finding a home more suitable for them, so that he could relieve Mrs. Smith of the care of them. * * * He always repeated his extreme affection for the boys."

Mrs. Hartzell testifies that Smith said, after the divorce was granted, that he would not have insisted on her getting a divorce from the doctor if he had not intended to provide for her and the boys; that subsequent to the marriage of the present defendant Smith said that Bessie and Mrs. Smith were friends, and everything would be all right, and that Bessie and the boys were to be provided for just the same. And still later:

"He said he thought he would have to find another home for the boys, because children worried Mrs. Smith; that he intended to care for them all the same, whether their home was with him or somewhere else; that he intended to take care of them as though they were his own."

On cross-examination she further testifies that Mrs. Smith—"said that she understood what P. B. had wished, and she intended to carry out his wishes regarding the boys. * * * It was very soon after his death."

Further than this, W. T. Price relates a conversation which he had with Smith after his marriage to the defendant, and while plaintiff was living with Price, her second husband, in which Smith said:

"Bess and the children are well provided for. * *

* I want to see that the boys have a good education and means to go into any business that seems best for them to when the time comes. If I live, I shall see that it is done, and, if not, they are well provided for."

In refutation of plaintiff's proofs, the defendant denies utterly that she had any such conversation with plaintiff as she relates, while plaintiff and her husband, Price, were on their visit to Minneapolis after the death of Smith, or that she at any time agreed to carry into effect in any respect the alleged modified agreement which plaintiff claims she had with Smith; and she denies making any remark to Mrs. Hartzell to the effect that she understood Smith's wishes were such that she had any care or responsibility, either financially or morally, of the plaintiff or the children, and denies any recollection of ever having had any such conversation with

Mrs. Hartzell as she relates. The defendant states, however, that at the time of plaintiff's visit she gave her (plaintiff) money with which to bear her and her husband's expenses back to California.

It developed soon after Smith's marriage with defendant that plaintiff had not been managing the household to the satisfaction of Smith, that she had been extravagant, and that she had, prior to her divorce from MacLean, sent him money unknown to Smith, which annoyed and worried Smith greatly. Subsequent to the marriage, there was an effort to find a place where plaintiff and her children could stay; it being understood that Smith would bear their expenses. Such an arrangement was not consummated, and plaintiff went on the stage, very much against Smith's wishes, and her children were in the meantime maintained at his home. Plaintiff remained on the stage for some time, when again the separate maintenance of herself and the children came up, which finally resulted in Smith sending for plaintiff's own father, and it was arranged that plaintiff and her children should go to the Pacific Coast, that her father would contribute to their maintenance the sum of \$50 per month, and that Smith would contribute a like amount. Her father failed in his promise, and Smith contributed the entire amount up to the time of plaintiff's marriage to Price, when he reduced his advancements to \$50 per month for the use of the children. Later he advanced to plaintiff and her husband \$2000 with which to construct a residence, and at that time he discontinued all allowances for the support of plaintiff and the children.

As evidence of his solicitude for plaintiff and the children, and as indicative of his feeling towards her and of the manner in which she had treated him, is his letter to E. A. Wright, an uncle of plaintiff by marriage, in an endeavor to secure a home for plaintiff and her children, written February 16, 1903, less than a year after his marriage to defendant. He says:

“Herewith please find a letter from Bess, which indicates that she is cured of her stage folly, and it now becomes a question what to do with and for her and her children. The way she has treated me I can hardly be expected to take her back into my home again, and yet I want to do all I can to enable her to live properly and bring up the children as they should be brought up. Bess has absolutely no idea of the value of money; neither has she any sense of obligation, or even honesty, so far as money is concerned; but she has many good impulses, and she dearly loves the children, and wants to have them, and she has certainly shown good judgment in discipline of the children.”

The letter culminates in an offer of \$85 per month to Wright to take plaintiff and children and give them a home. Wright was not able to comply with the request, and then came the arrangement with plaintiff's father as above noticed.

In conformity with the tone of this letter is the conversation Smith had with Mr. and Mrs. Lauderdale, which took place some time after his marriage to defendant. He said to them:

“I think you know the family well enough, and know

me well enough, to know that I have done everything that I possibly could do for Bess, and for the children, and it has got to the point where I must draw a halt. * * * She has told different parties in regard to what I was doing and what I was not doing, and it certainly is not fair to me that she should circulate those stories, and I have no defense at all. The whole gist of the matter is that I am going to stop; I am not going to do anything more for them. As long as the children are in my house, I will take care of them; but further than that I must absolutely stop."

Smith was very much wrought up over the situation.

As relates to the alleged agreement and modified agreement with Smith to leave his property to plaintiff, the testimony of Mrs. Jessie Carey Smith is pertinent. She relates, in effect, that she had a conversation with plaintiff after the will was probated, in which plaintiff told her that she was very much disappointed at the way things had been left, to which witness replied, "I don't suppose you expected P. B. to leave you anything," and she answered that she thought he might have remembered the boys in his will, but at no time did she say anything about claiming any contract for a will. Witness further says:

"I had a talk with her about why P. B. didn't adopt her. * * * She said that her mother hadn't wanted P. B. to adopt her, because her own father had mining interests which they hoped might develop into something worth while, and they thought he would be more favorably inclined to remember her generously if she were not the adopted child of another man."

Thus the relations of these parties are quite fairly indicated, and their feelings, motives, and disposition one towards the other. And now come the solemn acts of Peter B. Smith in the disposition of his property. It is everywhere agreed, and by all parties to the record, that Smith possessed a high sense of honor and integrity, was unusually careful and exact in all his business dealings, and fulfilled his obligations, whatsoever their character, punctiliously and to the very letter. On the very day of his marriage to defendant he made his first will. This was some seven or eight months only after it is alleged that he entered into the agreement to leave everything to the plaintiff. This circumstance is in strong refutation of the plaintiff's testimony respecting the alleged first agreement. Considering Smith's sense of honor, and his faithfulness in observing his obligations, it seems hardly probable that he would have made such a will in disregard of such an agreement.

When he made the second will, circumstances had greatly changed. Plaintiff had remarried, and had a home of her own, and her husband, Price, had duly adopted her two children, and in the meantime Smith had expended a large amount of money in the support of plaintiff and her children away from his domicile, so that he evidently felt under no further obligation to provide for them out of his estate. Hence he gave his entire estate to the defendant, his present wife.

As it relates to the alleged trust arrangement with the defendant to carry into effect the alleged modification with the defendant to carry into effect the alleged modi-

fied agreement of Smith to leave his property equally to plaintiff, her children, and the defendant, the plaintiff is flatly contradicted by the defendant, and the testimony of Jessie Carey Smith lends support to the defendant's testimony. Upon the whole, it is clear to my mind that the plaintiff has failed to establish either the alleged first, or the modified, agreement by such clear and convincing proof as is required for the substantiation of parol agreements of the kind. And as to the alleged trust agreement with the defendant, the clear preponderance of the evidence is against plaintiff's contention. I am waiving the question whether the trust agreement is of a character susceptible of enforcement at all.

For these reasons, plaintiff is not entitled to recover, and her complaint will be dismissed, with costs to the defendant.

Filed July 6, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 5th day of January, 1916, there was duly filed in said Court and cause, a Petition for Appeal, in words and figures as follows, to wit:

PETITION FOR APPEAL.

The above named complainant, conceiving herself aggrieved by the judgment and decree entered herein on July 6, 1915, in the above suit, doth hereby appeal from said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and she prays that her appeal may be allowed and said decree reversed; and that a transcript of the record and proceed-

ings and papers upon which the said decree was rendered, duly authenticated, may be sent to the Circuit Court of Appeals.

Wm. H. Hallam,
Solicitor for Complainant.

And now to-wit, on this 5th day of January, 1916, it is ordered that the appeal be allowed as prayed for.

Chas. E. Wolverton,
District Judge.

Filed January 5, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 5th day of January, 1916, there was duly filed in said Court and cause, an Assignment of Errors, in words and figures as follows, to wit:

ASSIGNMENT OF ERRORS.

Complainant in the above entitled suit assigns the following errors, to-wit:

I.

The court erred in its judgment and decree wherein and whereby the court ordered adjudged and decreed that the bill of complaint herein be dismissed.

II.

The court erred in denying the complainant the relief for which she prayed in her bill of complaint.

III.

The court erred in rejecting the complaint's offer in evidence of the certain letter of C. A. Brown to the com-

plainant, marked as Complainant's Exhibit "F," which letter is in words and terms as follows:

Minneapolis, Minn.,

June 26, 1909.

Mrs. Elizabeth S. Price,

1200 Second Avenue South,

City.

Dear Madam:

Mr. Dunwoody has turned over to me your letter to him of June 24th for the reason that this being his last day in Minneapolis his time is exceedingly crowded and he cannot find the opportunity to reply in person. He has, however, talked with me quite fully concerning the contents of your letter and has outlined his ideas in regard to your affairs, so that I feel warranted in saying that this letter expresses his sentiments as fully as my own.

I have not seen Mr. Hartzell since his return, but am not surprised at the position he takes in regard to the uselessness of conferring with your attorneys. Our position in regard to that is precisely the same. We would have no confidence whatever in any predictions made in regard to the outcome of the case by an attorney who will take a case on a contingent fee, and we can see no object in talking with them about the matter, because we feel absolutely certain that Mrs. Smith can neither be cajoled or threatened into making any settlement of this suit. We feel certain that by your course in trying to break the will of Mr. Smith you have put yourself

beyond the pale of her sympathies, and that the only hope of accomplishing anything in an appeal to her lies in reaching her sense of justice concerning the education and maintenance of your boys, in regard to which I understand she has acknowledged several times that Mr. Smith intended some provisions should be made for them and relied upon her to carry out his wishes. We believe her position is that your course has made it impossible for her thus far to do anything along this line and that nothing of this kind could be done until this lawsuit was finally disposed of. In any event we do not anticipate that she would be willing to pay over a lump sum of money to be handled by you or your attorneys.

We should suppose that if she can be persuaded to do anything it would something along the line of placing your boys in a good school where they would be well taken care of and where the necessity of their education, which is becoming urgent, would be fully met. Of course we have no means of knowing whether she would even do this, but we should be greatly disappointed if she refused to do anything of this kind. It would not be surprising, however, if she made it a condition that these legal proceedings should be discontinued before undertaking the education of your boys.

It is our opinion that if such an arrangement could be brought about it would be altogether the best thing possible for the future of your sons, and that, of course, is dearer to you as a mother than

anything else on earth. Furthermore, it would leave you unhampered to earn your own living, which you have thus far not been able to do, presumably because you were so tied down by the care of your children that you could not give up your entire time to any employment. We can conceive of no other reason why a woman in the prime of life and in reasonably good health and with the advantage of an appeal to the sympathies of people, and with friends to speak a good word for her, could not within a reasonable length of time secure employment, by means of which she could, with strict economy, maintain herself in a fair degree of comfort. Innumerable women have to do this, and do it successfully even when they have no friends to fall back upon in case of emergency, as you have thus far had.

Yours truly,

C. A. Brown.

IV.

The court erred in rejecting the complainant's offer in evidence of the authenticated copy of the inventory of the estate of Peter B. Smith, verified by the defendant herein, which inventory was so offered by the complainant as complainant's Exhibit "G," and marked and designated as such.

Wm. H. Hallam,
Solicitor for Complainant.

Filed January 5, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 27th day of July, 1916,

there was duly filed in said Court and cause, a Bond on Appeal in words and figures as follows, to wit:

BOND ON APPEAL.

Know all Men by These Presents, That we, O. J. Hawkenson and A. H. Herndobler are held and firmly bound unto Marie Dewey Wallace, defendant above named, in the sum of five hundred dollars, to be paid to the said Marie Dewey Wallace, her executors or administrators. To which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated July 27, 1916.

Whereas, the above named Elizabeth M. Price has appealed to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree in the above entitled cause by the District Court of the United States for the District of Oregon.

Now, therefore, the condition of this obligation is such, that if the above named Elizabeth M. Price shall prosecute said appeal to effect, and answer all costs if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and virtue.

O. J. Hawkenson, L. S.

A. H. Herndobler, L. S.

Signed, sealed and delivered in presence of

Paul Johnson.

United States of America,
District of Oregon—ss.

I, O. J. Hawkenson, being duly sworn, depose and say that I am one of the sureties in the foregoing bond, that I am a resident and freeholder within said district, and that I am worth, in property situated therein, the sum of one thousand dollars, over and above all my just debts and liabilities exclusive of property exempt from execution.

O. J. Hawkenson.

Subscribed and sworn to before me this 27th day of July, 1916.

(Notarial seal)

A. L. Morland,
Notary Public for Oregon.

My commission expires April 27, 1917.

United States of America,
District of Oregon—ss.

I, A. H. Herndobler, being duly sworn, depose and say that I am one of the sureties in the foregoing bond, that I am a resident and free holder within said District, and that I am worth in property situated therein, the sum of one thousand dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

A. H. Herndobler.

Subscribed and sworn to before me this 27th day of July, 1916.

(Notarial seal)

A. L. Morland,
Notary Public for Oregon.

My commission expires April 27, 1917.

Examined and approved this 27th day of July, 1916.

Chas. E. Wolverton, Judge.

Filed July 27, 1916. G. H. Marsh, Clerk.

And afterwards, to wit, on the 4th day of August, 1916, there was duly filed in said Court and cause, a Statement of the Evidence, in words and figures as follows, to wit:

STATEMENT OF THE EVIDENCE.

This cause came on for trial before the Hon. Charles E. Wolverton, on the 21st day of June, 1915, at the Federal Building in the City of Portland, Multnomah County, Oregon, the complainant then and there appearing, attended by her counsel, Wm. H. Hallam, Esq., and the defendant then and there appearing, attending by her counsel, Messrs. Wood, Montague & Hunt and Hugh V. Mercer, Esq., and thereupon the following proceedings were had, to-wit:

Mr. Mercer: At this time we desire to direct the court's attention to the fact that we have pleaded that this case is *res judicata*; that everything in this complaint, in substance and effect, has been adjudicated against the plaintiff, and was adjudicated against her by the District Court of Hennepin County, Minnesota, in 1909. We therefore ask the court at this time, first, that it take up and decide the legal question as to whether or not this case is *res judicata* on the files and records in the case at this time; second, that the plaintiff is foreclosed of any claim under this complaint, or at all, on the judgment that has been rendered, and which remains in

full force, and an exemplified copy of which is attached to the answer.

COURT: Does that arise upon motion to dismiss in this case?

Mr. Mercer: Yes. It has never been presented. The rules in equity provide that it may be taken up before the trial, but not that it shall be. The new rules provide that we may make any plea of this sort in our answer. There has been no amendment of the complaint to any way avoid that judgment, and there is no replication, and the matter stands here uncontested on the record.

Mr. Hallam: I want to object to this motion. We have had no notice of any such application. Counsel is overlooking the fact that, under the new equity rules, no replication is necessary.

COURT: It is admitted practically that the complaint in the present case sets forth the same cause of action that was set forth in the case brought in the Minnesota court. So that there is practically no disagreement on the subject as to whether this presents the same cause of action that was presented in that court. The demurrer to the complaint in the Minnesota court sets forth four causes for demurrer: First, that the court had no jurisdiction of the subject of the action; second, that the plaintiff had no legal capacity to sue; third, that there is a defect of parties plaintiff, in that Donald McLean should be made a party plaintiff therein; and fourth, that the facts stated do not constitute a cause of suit.

The court in Minnesota has passed upon that demurrer, and has declared that the demurrer is in all things sustained. That would seem to imply that it sustained the demurrer upon every ground which was stated in the demurrer itself. Yet I am not entirely clear about it, and I would rather not at this time undertake to decide the question absolutely. There is a presumption further than this, by reason of that declaration in the order of the court, that the court passed upon the merits of this case in that demurrer. Of course, when a demurrer is filed to a complaint, it is a confession, for the purposes of that demurrer, that all the allegations of the complaint are true. If the demurrer is sustained, then, for the purposes of that complaint, the court has held that the complaint is insufficient to constitute a cause of action.

In this case the parties had an opportunity to amend. The court gave them twenty days, and the parties did not amend. I think there was an application made, as I see from the record, for further time in which to amend the complaint, and the court took that under consideration, and determined that they should not have further time to amend. I notice in a case cited, decided by Judge Morrow in the Circuit Court of Appeals for the Ninth Circuit, he invokes a presumption upon which he determined that the case was at that time determined upon the merits, and therefore he held that the judgment on the demurrer was a bar to a subsequent action upon the same cause.

Now, the only thing that remains in my mind as to doubt on this question is this: There are four causes set forth for the demurrer in this case. I conceive that pos-

sibly the court might have sustained the demurrer upon perhaps the second or third cause. If so, it would not be a bar to this case. It is a matter that I desire to look into further. I have a strong impression about the matter, as to how it should be decided upon this demurrer, or upon this motion. However, out of due precaution that the case shall not go off without due consideration, I have concluded that, the parties being present, a large number of depositions having been taken, and every one being ready for trial, I will take the testimony and decide the matter fully at the end of the hearing of the testimony, and upon argument upon the merits.

Therefore I will simply hold my judgment upon this proposition in abeyance until the case is heard upon its merits.

Mr. Mercer: I suppose of course, if you should rule against us on that motion when you do come to rule upon it, that you would allow us an exception.

COURT: Very well. I have not ruled on it. I have not passed an opinion on it.

Mr. Mercer: I understand, but we may not be here when you do rule on it.

COURT: Very well. You may have your exception, whatever you desire in the case. You may proceed with the testimony.

WILLIAM T. PRICE

Called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Hallam:

Where do you live, Mr. Price?

A. Napa County, California.

Q. How long have you lived there?

Mr. Mercer: In order to make the record complete, if your Honor please, conceding that this is a preliminary elementary question in the case, if any question is proper in the case, we object to it on the ground that this is an attempt to go into the matter which has once been adjudicated in Minnesota; second, that the complaint here does not state a cause of action for any relief, equitable or otherwise, and that such relief, if any, as they would be entitled to has been outlawed and barred by laches; in order to get a ruling on it, so we don't need to be bringing it up before the court all along the line.

COURT: Very well. The court will overrule your objection, and you may have your exception, and note it in the record; and that objection and exception may obtain throughout the entire record.

Mr. Mercer: That is what I wanted, to have an understanding by counsel and the court now, that we would not be interrupting the court, and to have it understood that we might have our exception right along to all the evidence on those grounds.

COURT: Very well. That will be understood.

(Question read.)

A. Three years.

Q. Where did you live before that?

A. In Mill Valley, California?

Q. How long did you live in California?

A. 15 years.

Q. Where did you live before that time?

A. Cleveland, Ohio.

Q. How long did you live in the State of Ohio?

A. I was born there, and had always voted there prior to coming to California.

Q. What is your business, Mr. Price?

A. I am a farmer now.

Q. You own a farm of your own, do you?

A. Yes, sir.

Q. Are you operating it yourself personally?

A. Yes, sir.

Q. Do you know the complainant in this action—Mrs. Price?

A. Yes, sir.

Q. When did you first know the complainant?

A. I should say it was probably in 1905 or 1906. I think it was before the San Francisco—before the earthquake, I imagine. My recollection is it was before the earthquake. She came to Mill Valley, and I met her probably soon after she came there.

Q. Was she the wife of your son?

A. Not when she came there. They were afterwards married.

Q. Yes, she became the wife of your son?

A. Yes.

Q. Now, perhaps it would refresh your recollection as to dates—do you remember the year in which they were married?

A. No. No, I cannot.

Q. You cannot remember?

A. It was along possibly—

COURT: I suppose that can be proven by persons who know. There is no use to take up the time of the court on that subject.

Mr. Mercer: I think that is admitted.

COURT: If it is admitted, there is no use asking about it.

Mr. Hallam: There won't be any dispute about it.

A. It was between four and six that they were married.

Q. Did you know her there during any considerable period of time, there in California?

A. Well, I wouldn't say. Probably a year or two. Let me explain. I was in the dry goods trade there, and she came into the store there, as other people did, to transact business, and I knew who she was.

Q. You had a store in Mill Valley?

A. Yes, sir.

Q. Do you still have that store?

A. No, sir.

Q. Did you ever meet Peter B. Smith, the deceased?

A. Yes, sir.

Q. Where?

A. Well, I met him in Mill Valley, is the only place I recollect of ever meeting him.

Q. Do you know when that was?

A. Well, to the best of my recollection it was, say, the latter part of April or May, 1906. I base these things on the San Francisco fire, and it was after the fire that they were there.

Q. You refer to the earthquake and fire?

A. Earthquake, yes.

Q. Shortly after that.

A. Yes, sir. My recollection would say not to exceed two months, and probably less than a month. So it was the latter part of April or in May that I met him there.

Q. Do you know the occasion of his coming there at that time?

A. Yes, he had been at the Islands, as I understood it then, and he stopped there to see Mrs. Price and the children. They were on their road back to Minneapolis, as I understood it then.

Q. By "they" you mean him and his wife?

A. Yes, sir, Mr. and Mrs. Smith.

Q. The defendant in this suit?

A. Yes, sir.

Q. Now, on that occasion did you have any conversation with Mr. Smith?

A. Yes, sir.

Q. Where did that occur, if you remember?

COURT: That is the wife?

Mr. Hallam: No, Mr. Smith.

COURT: Oh, Mr. Smith. I thought you said Mrs. Smith.

Mr. Mercer: You are just fixing the place?

Mr. Hallam: Yes.

A. The only one that would have any bearing that I recollect of, on this case, occurred in my store.

Q. Well, I will ask you to state to the court if you had any conversation with him with reference to this complainant, or her children, or both?

A. Why, yes, I had in a general way.

Q. How long was he there at your store on that occasion, if you remember?

A. Possibly an hour or so. He would drop in there to chat, and as he did occasionally, or a few times, and it drifted on this subject.

Q. You mean a few times during the course of this visit?

A. Yes, sir.

Q. Now, what did he say to you on this subject?

Mr. Mercer: That is, on the subject of the plaintiff and her children? Or on the subject of this alleged contract?

Mr. Hallam: On the subject of the complainant and the children.

COURT: Unless it bears on this contract, it would be immaterial.

Mr. Hallam: I will make the question more definite, if the court please.

Q. What conversation did you have with Mr. Smith, if any, concerning his intentions as to future disposition for the complainant and the children?

Mr. Mercer: I object to that as immaterial under the pleadings, and not proper unless the defendant was present at that conversation. He is undertaking to show something binding her.

COURT: I will overrule your objection. You may have your exception.

Mr. Mercer: Let my exception apply to each one, so we won't have to be annoying the court.

COURT: Very well.

A. In the course of the conversation I have referred to, we drifted on to the care of the coming generation, and I had referred to my own affairs, when I had but the one child and he was the only heir, and if the good Lord had seen proper to take me away then, there would have been quite an estate. He was a pretty fast liver, and had been used to what money he cared for all the time, and I didn't think it was good judgment to let him come into quite the amount of money at his age.

COURT: You better state what he said. We don't care what you said.

Mr. Mercer: I ask to strike out what the witness has said there.

COURT: I think that may go out.

A. Well, then, Mr. Smith said that he thought it just as well to leave money to the people he intended it for in the hands of some one, a person that he was satis-

fied would use it in a proper way; and he said that, "I am going to see,"—no, he says, "Bess and the children are well provided—Bess and the children are well provided for."

Q. Meaning the plaintiff?

A. Meaning the two boys that were playing around outside. They would come into the store once in a while—they would come in. Whenever they came in his eyes would brighten up. They would come up to him. He would fondle them. He seemed very much taken up—extremely taken up with the children. He said "Those are two smart boys."

COURT: That is what he said, that "Bess and the children are well provided for?"

A. "Are well provided for."

Q. Was there anything else right in that connection, or is that all?

COURT: Is that all he said on that subject?

A. He said, "I want to see that the boys have a good education and means to go into any business that seems best for them to when the time comes. If I live, I shall see that it is done; and if not, they are well provided for."

Q. What did you observe, if anything, in regard to his manner toward the boys?

Objected to.

COURT: I think that is immaterial.

Mr. Hallam: Anything, it seems to me, your Honor, indicating his love and affection toward the boys.

COURT: I suppose we may assume that he had an affection for those children.

Mr. Hallam: Yes.

Q. You say the complainant was the wife of your son?

A. Yes, sir.

Q. Is your son now deceased?

A. Yes, sir.

Q. When did he die, about?

COURT: Is that set up in the complaint?

Mr. Mercer: I believe it is set up that he died.

Mr. Hallam: I think it is. I think the answer denies knowledge or information.

Mr. Mercer: We didn't know when they brought the action, but we have understood since that the plaintiff's second husband had died.

Mr. Hallam: About a year ago—something like that.

COURT: You may state when it was. Get it on the record.

A. March 4, 1914.

CROSS EXAMINATION.

Questions by Mr. Mercer:

There was nothing said in that conversation, Mr. Price, about Mrs. Smith, was there?

A. I hardly think so.

Q. Nothing more definite said about property interests than you have told us?

A. I don't recall anything.

Q. Was your son at that time married to the plaintiff?

A. Yes, sir.

Q. And her husband was in business with you?

A. Yes, sir. Well, he was employed by me.

Q. Yes, there in the store?

A. Yes, sir.

Q. Did Mr. Smith tell you in that conversation that he was providing for them by building them a house?

A. No, sir.

Q. Or loaning them money to build them a house?

A. No, sir.

Q. Did he say anything about intending to give to them a note which he had taken for the money used for building the house in which they were to live?

A. I hardly think so. I don't imagine—I don't recollect of our conversation drifting on that at all.

Q. He said nothing about his having given them a lot or a home?

A. I don't recollect of it, no, sir.

Excused.

W. J. HARTZELL.

Called as a witness on behalf of the complainant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Hallam:

Mr. Hartzell, where do you live?

A. Medford, Oregon.

Q. How long have you lived there?

A. Five years.

Q. What business are you engaged in?

A. Ranchman.

Q. Where is your ranch from Medford?

A. South.

Q. How near Medford?

A. Four miles.

Q. You have lived there since you came to Oregon?

A. Yes, sir.

Q. Where did you live before you came to Oregon?

A. Minneapolis.

Q. How long did you live in Minneapolis?

A. 27 years.

Q. What was your business there?

A. In the grain business.

Q. Were you connected with any firm there?

A. Yes, sir, the Van Duzen-Harrington Company.

Q. During how long were you with them?

A. The whole of that time.

Q. Do you know the complainant in this action?

A. Mrs. Price?

Q. Yes.

A. Yes, sir.

Q. Are you related to her?

A. No, sir.

Q. Is your wife related to her?

A. Yes, sir.

Q. What is your wife's relation to her?

A. Cousin.

Q. First cousin?

A. Their mothers were sisters.

Q. Do you know the defendant?

A. Yes, sir.

Q. Did you know Mr. Smith?

A. Yes, sir.

Q. Were you on friendly terms with Mr. Smith?

A. Yes, sir.

Q. Did you at any time have a conversation with this defendant, after Mr. Smith's death, concerning his will?

A. Yes, sir.

Q. Tell about when that was, and where it was, if you can?

A. I was requested to come to—

Mr. Mercer: Just a moment. May I have the same objection?

COURT: Very well. You may have the same objection, and the objection will be overruled, and you may have your exception.

Mr. Mercer: When was that?

Q. Yes, that is the question, when and where?

A. Well, you will be able to fix that more closely than I. I was asked to come to the office of Wilson & Mercer, and there met Mrs. Smith—perhaps others; I don't recall who else was there.

Q. Can you for yourself tell with some approximation when it was with reference to anything?

A. This must have been within a month or two of the death of Mr. Smith.

Q. You say this conversation occurred at the office of Wilson & Mercer?

A. Yes, sir.

Q. You met the defendant there?

A. Yes, sir.

Q. Now, what was that conversation?

Mr. Mercer: Just a moment. Does that relate to anything with respect to this contract alleged?

Mr. Hallam: I think my question stated relating to the will. I will make the question more definite.

Q. With relation to the will and Mr. Smith's disposition towards the complainant or her boys?

Mr. Mercer: I think I will object to that, if it relates simply to the will that was made and Mr. Smith's disposition toward the boys and the complainant.

COURT: I will see what the development is.

Mr. Mercer: Yes, I want to reserve the right.

COURT: Yes, you may have your exception.

A. Well, on coming into the room, I said to Mrs. Smith I was very much surprised to see that Mr. Smith made no provision for the boys in the will. She said, "Why, Mr. Hartzell, I think that is one of the finest things P. B. ever did. He left it to my honor to take care of those boys, and I propose to do it, and see that they have good schooling. But," she says, "I can't do anything for Bess now."

Q. Is that the whole of the conversation, as you recollect it?

A. That is as I remember it, and that is all.

Q. Did you have any other conversation with the

defendant at any time with reference to the same subject-matter?

A. No, I think not.

Q. Did you at any time have any conversation with Mr. Smith concerning his proposed care or disposition for the complainant or the boys?

Mr. Mercer: I move to strike out the alleged conversation given by the witness, upon the ground that it is not material to any issue in this case.

COURT: I will overrule that motion. Defendant allowed an exception.

A. Yes, sir, I did.

Q. One or more than one, do you recollect?

A. Well, I remember more than one.

Q. Do you remember about when the first one was?

A. Yes. It was previous to the marriage of Mr. and Mrs. Smith.

Q. Well, to render that definite, do you remember when they were married?

Mr. Mercer: May, 1902, wasn't it?

Mr. Hallam: May, 1902. That is admitted.

Q. Do you remember how long before that time?

A. Probably six months or a year. It was when the younger boy was a baby.

Q. Do you remember where that conversation occurred?

A. At my own house, I think.

Q. At your own house?

A. Yes.

Q. Well, I will ask you, were you in the habit of calling forth and back, Mr. Smith's family and your family?

A. Yes, we went there sometimes. They called at our house.

Q. Well, now, will you state what that conversation was?

Mr. Mercer: I object to that on the same grounds I objected to the other conversation. It may be understood that this objection goes to that line; and I want to add the further objection that this alleged conversation was before the marriage of the defendant; as I understand, it is not claimed that she was present. I don't suppose it is claimed that this conversation was communicated to her in any way. I think that makes it doubly objectionable. Let me add the further objection that the statutes of Minnesota, at the time Mr. Sith died and for a considerable time prior to his death, had a provision that would revoke any will that had been made, by virtue of a marriage; that is, that a marriage would revoke the will by statute.

Objection overruled. Exception allowed.

COURT: You may answer the question.

A. What the conversation was?

COURT: Yes at that time. This was before the marriage?

A. This was before the marriage, yes, sir. The little boys were playing about on the floor, and I was interested in them, and he said, "You are fond of children." I said, "Yes, very." "Well," he says, "I have

none of my own except these little fellows, and I feel toward them as though they were my own babies. And," he says, "I propose always to care for them."

Q. Is that all? Was anything further in the conversation?

A. Oh, yes, but I think that was all—

Q. On that line?

A. Yes, sir.

Q. You say you had more than one conversation with him of the same nature?

A. Yes.

Q. When was the next, as near as you know?

A. Well, I had another conversation with him in his own house later.

COURT: Was that after the marriage?

A. Yes, sir.

Q. Can you fix that date approximately—the time, the year?

A. No. No, but it was the time that they had the children at their house after Mr. and Mrs. Smith were living there and caring for the children, and the mother was not then with them. The mother was in the East. And in the course of the conversation he said, as he had said to me before, that the children had been very trying to Mrs. Smith, and that he felt almost the necessity of finding another home for them. He said, "Bess, of course, is trying to make her own way now, but I have to help her all the time," and he says, "I think I will have to arrange a home for them somewhere. But," he says, "I expect to take care of them, feel toward

them as though they were my own boys, and shall always provide for them."

Q. Is that the whole conversation?

A. I think that is all that related to this subject.

Q. Did you have any other conversation with him in regard to this subject?

A. Well, about that time there were two or three times he consulted with me about the possibility of finding a home more suitable for them, so that he could relieve Mrs. Smith of the care of them. But there was nothing, perhaps, that related to this contract which he spoke of.

Q. Did he say anything further with reference to the complainant or the boys either?

A. No, nothing more than he always repeated his extreme affection for the boys.

Q. You remained in Minneapolis, I think you have testified, down to the time of his death?

A. And afterwards, yes, sir.

Q. Did you keep up this calling acquaintance with him down to the time of his death?

A. Yes, sir.

Q. Did he ever express any different views from those that you have related?

A. No.

CROSS EXAMINATION.

Questions by Mr. Mercer:

Mr. Hartzell, you, I believe, had a little correspond-

ence with me to know whether you knew anything about this matter? in any way?

A. Yes, sir.

Q. And I am not sure that I have the letters with me at the hotel, but I suppose you remember writing me, within a month or two, that neither you nor your family knew anything about this matter that you thought would bear upon it?

A. No, sir, not that language.

Q. What did you say?

A. I said I didn't think we knew anything that would be valuable to you in this case.

Q. Nothing that would be valuable to us?

A. Yes, sir.

Q. Now, do you say you had a conversation with Mrs. Smith up at the office of Wilson & Mercer?

A. Yes, sir.

Q. There was nothing said in that conversation about there being any contract of this sort, was there?

A. No, sir.

Q. No intimation from anybody's standpoint that there was any contract to make a will?

A. Let me understand exactly what contract you mean, Mr. Mercer.

Q. I want you to understand, Mr. Hartzell, exactly what it was. My question is, there was nothing said in that conversation with Mrs. Smith, who is now Mrs. Wallace?

A. Beg your pardon.

Q. Who is now Mrs. Wallace?

A. Yes.

Q. Who sits here by my side?

A. Yes.

Q. About Peter B. Smith having made any agreement to make his property over to these children?

A. No, sir.

Q. Nor about his having made any agreement to make a will to leave any of his property to plaintiff?

A. No.

Q. And nothing of that kind could be inferred from your conversation, could it?

A. No.

Q. Do you remember who was present at that conversation?

A. No, I don't recall. There were three or four people in the room, but I wouldn't be sure who they were. I think, of course, yourself and Mr. Wilson.

Q. Don't you remember that Gen. Wilson was handling this estate? You don't remember my being there?

A. No, I don't. I don't recall who was there. What I have repeated is, in fact, all that was of any interest to me in that conversation.

Q. But she didn't say that Mr. Smith had delegated any matter of taking care of the children to her, did she?

A. I think I have repeated everything that was said between us.

Q. All that you recollect of being said in the slightest way?

A. Yes.

Q. Now, you knew Mrs. Smith?

A. Yes, sir.

Q. You know the plaintiff, of course?

A. Yes.

Q. Had known her for a great many years?

A. Yes.

Q. You knew Peter B. Smith pretty well, didn't you?

A. Yes, sir.

Q. Peter B. Smith was a man of the very highest business integrity, wasn't he?

A. None better.

Q. And from your knowledge of Peter B. Smith in his business relations, you have every reason to believe that he would have carried out any deal if he had made it, don't you?

A. Yes.

Q. Peter B. Smith was at one time president of the Chamber of Commerce there?

A. Yes, sir.

Q. When you were there; he was manager of the St. Anthony & Dakota Elevator Company?

A. Yes, sir.

Q. That was one of the largest companies operating out of there—line elevators, wasn't it?

A. Yes, sir.

Q. And Van Duzen-Harrington Company, with which you were connected, was one of the largest companies there?

A. Yes, sir.

Q. And you managed their cattle business in St. Paul, didn't you?

A. Yes, sir.

Q. Your company was a client of our office, I think?

Q. And Mr. Smith, as you understood it, the St.

A. Yes, sir.

Anthony & Dakota?

A. The St. Anthony & Dakota was a client of yours?

Q. Yes.

A. I don't believe I knew that.

Well, the Chamber, you knew, was?

A. Yes.

REDIRECT EXAMINATION

Q. What would you say, Mr. Hartzell, as to Mr. Smith—you knew him well—being a kindly-disposed, generous man? or otherwise?

Mr. Mercer: I will admit he was a kindly-disposed, generous man.

Mr. Hallam: That is admitted on both sides, that is his disposition. Very well. That is admitted.

Mr. Mercer: Yes.

Excused.

FLORENCE HARTZELL:

Called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Hallam:

Mrs. Hartzell, you are the wife of Mr. Hartzell, who just testified?

A. Yes, sir.

Q. And you knew Mr. Smith?

A. I did.

Q. And you knew the complainant and the defendant?

A. Yes.

Q. Did you ever have any conversation with Mr. Smith concerning his intent or disposition toward the complainant and the children?

Mr. Mercer: Just a moment. Now, there is a technical objection to that: we would like to have the time and place fixed before we enter any other objection.

COURT: You may fix that.

Q. At any time while complainant was living in his home, in 1900, 1901, or 1902?

A. Well, they were mentioned down there in conversation.

Q. Now, can you tell about when the first of such conversations was, approximately?

A. Why, just at the time Mrs. MacLean's mother died, I think was about the first.

Mr. Hallam: Now, I think it is admitted that that was in 1900, Mr. Mercer.

Mr. Mercer: I think that is admitted in the pleading, your Honor.

Mr. Hallam: Yes, 1900.

Q. Well, how soon was it after, if you remember, how soon was it after the plaintiff's mother died?

A. It was at the time of her death. We went there to attend the funeral.

Q. What did Mr. Smith say at that time, if anything, with relation to complainant?

Mr. Mercer: Same objection, as not being admissible under the pleadings, for the reasons stated in that objection when Mr. Price was on the stand; and the further objection that was made to the testimony of Mr. Hartzell on the question that was put to him respecting the alleged conversations before the defendant married Mr. Smith. And I will add the further objection here that the time is not sufficiently definitely fixed; and I do that because they allege that this first contract took place in October, 1902, I believe, and I would like to know whether it was before or after that, as I understand it is 1900 or 1902, now, which is it?

Mr. Hallam: This conversation would be before that.

Mr. Mercer: If it is claimed it was at the funeral.

Mr. Hallam: It was shortly after her death.

Mr. Mercer: If it is something connected with the funeral, I think the further objection, that a man under distress and grief, matters ought not to be brought up that he might say at that time, if he did say anything; especially when it is against a party who had nothing to do with it, and who didn't come into the transaction at all for two years afterwards.

COURT: I am only hearing this testimony to explain any disposition that he might make of the property. It is not testimony that would be binding upon

anybody, except to put the court in the position that the testator was in. The objection will be overruled, therefore, and you may have your exception.

You may state what conversation took place there at that time, what you heard Mr. Smith say there at that time with regard to the disposition of his property.

A. He was telling the relatives who were there that Bessie and the boys would live with him, and that he would take care of them.

COURT: That the boys would live with him?

A. That Bessie and the boy—that was then.

Q. Was that the whole of the conversation at that time?

A. Yes, that is all.

Q. Well, now, on any subsequent occasion did you hear him make any remarks in regard to his care or disposition for Bessie and the boys?

A. Yes, sir.

Q. When as near as you can tell?

A. Well, I recall a conversation that we had very soon after she was divorced from Dr. MacLean?

COURT: From whom?

A. Dr. MacLean.

COURT: That was the plaintiff here?

A. Yes, sir.

COURT: Tell what it was.

Mr. Mercer: That same objection goes to all those conversations.

COURT: Yes, that will be understood.

A. He said that he would not have insisted on her getting a divorce from the doctor if he had not intended to provide for her and the boys.

Q. When did that occur?

A. At his home.

Q. At his home?

A. Yes, sir.

COURT: At what time was this now?

Mr. Hallam: Well, I will ask the witness, your Honor, if she can fix definitely.

A. I don't recall the year it was in. I imagine it was in nineteen—about nineteen hundred, the latter part, or nineteen one. I don't remember the date.

COURT: The time of the divorce would fix it.

Mr. Mercer: Yes, we have those exemplified copies of the divorce proceedings, so there won't be any question about the time when the divorce was rendered.

Q. Is that all the conversation, all that you recollect at that time?

A. Yes, sir.

Q. Were you in the habit of calling at Mr. Smith's house from time to time frequently?

A. Yes, sir.

Q. Down to the time of his death or thereabouts?

A. Yes, sir.

Q. And was he in the habit of calling at your house after you married Mr. Hartzell?

A. Yes, sir.

Q. When were you and Mr. Hartzell married, about?

A. November, 1901.

Q. And you lived there from that time on in Minneapolis, and Mr. Smith did too?

A. Yes, sir.

Q. Now, you say you had, or did you say you had subsequent conversations with Mr. Smith with reference to Elizabeth and the boys?

A. Occasionally.

Mr. Mercer: Subsequent to when, Mr. Hallam?

Mr. Hallam: Subsequent to the conversation to which she last referred.

Mr. Mercer: Before his marriage to the defendant?

Mr. Hallam: I will ask her if she can tell when she had the next conversation.

A. Both before and after.

Q. Can you tell about when your next conversation with Mr. Smith was of that character?

A. They were so frequently mentioned I can't fix any dates.

COURT: It was before the marriage of Mr. Smith?

A. Yes, before she married Mr. Smith.

COURT: Tell what that conversation was. Was it near the marriage?

A. Well, about the time they were to be married.

COURT: Tell what that conversation was before the marriage.

A. He said that the marriage was not to make any difference; that Bessie and Mrs. Smith were friends, and everything would be all right, and that Bessie and the boys were to be provided for just the same.

Q. Now, you say you had conversations with him subsequent to that relating to the same subject?

A. Yes, sir.

Q. Bessie and the boys?

A. Yes, sir.

Q. You say you cannot specify the times?

A. Well, one time was when their mother was away, and they were talking of finding another home for the boys, because they worried Mrs. Smith.

COURT: That was after the marriage?

A. Yes, sir.

Q. Well, what was said at that time?

A. He said he thought he would have to find another home for the boys because children worried Mrs. Smith; that he intended to care for them all the same, whether their home was with him or somewhere else; that he intended to take care of them as though they were his own.

Q. As though they were his own?

A. Yes, sir.

Q. Well, was there any further discussion between you and him that you recollect?

A. He hated dreadfully to give up the boys. That worried him a great deal—he was so fond of them. He said he would rather—well, to use his expression, he said he would rather have his right hand cut off than to give up the boys.

Q. Did he say anything about Bessie?

A. Well, just that she was to be taken care of; he realized that she was away from them then; and he said he had to find a home for them. Later he sent for her

to take the boys to California. She was with them herself.

Mr. Mercer: That is, he told you that he sent for her to take them to California?

A. Yes, sir.

Q. He told you that?

A. Yes, sir.

Q. Well, now, in subsequent years, or at any time before Mr. Smith's death, did you have any further conversations with him, or did he make any remarks to you with reference to taking care of Bessie and the boys, after they were gone, or before they went at any time?

A. After they had been out here on a visit and he came back with pictures of the boys, he brought them over to show to us.

Q. Whom do you mean by "they"—Mr. and Mrs. Smith?

A. Mr. Smith and Mrs. Smith. And he still spoke of them in the same way, he called them his boys, and what he hoped their future might be. That was all.

Q. What did he say in regard to that, if anything, as to their future?

A. Well, he intended them to have a good schooling, everything as though they were his own. He always mentioned them in that way.

Q. You say he and defendant had recently returned from a visit to Bessie and the boys?

A. Yes, sir.

Q. Now, where were Bessie and the boys at that time?

A. In Mill Valley, California.

Q. Did he talk much about them after his return from that visit?

A. He never talked just about them in particular, only as they would come up in the conversation, naturally, like people talk about their children.

Q. You saw him soon after he returned, after they returned from that visit, did you?

A. Yes, sir.

Q. Do you recollect any subsequent occasion on which he referred to them?

A. Not any particular time.

Q. Were there any times, are you sure there were any subsequent times that he referred to them?

A. Well, every time we were together they were mentioned. He always spoke of them.

Q. Did you see him with similar frequency down to about the time of his death?

A. Yes, sir.

Q. Have you any recollection how shortly before his death you saw him? I think he died in the east—on a trip in the east. That is admitted.

A. Probably a couple of months or not so long. I don't recall.

Q. You didn't talk to him immediately before his taking that trip?

A. No, sir.

Q. Did he ever express himself in any different way concerning Bessie and the boys?

Mr. Mercer: Objected to. You mean her?

Mr. Hallam: Yes.

Mr. Mercer: You mean Bessie and the boys, or Bessie or the boys?

Mr. Hallam: Either one. Either or both.

COURT: You may answer the question.—

Q. Bessie and the boys—whatever the conversation was.

A. May I have the question again?

Q. Did he ever express himself to you in any different manner from that that you have related in your testimony?

A. No, sir.

Q. Did you ever have any conversation with the defendant Mrs. Smith in regard to Bessie and the boys? I mean in regard to the will.

A. No, sir.

Q. Or disposition? You didn't have any such conversation?

A. No.

CROSS EXAMINATION.

Questions by Mr. Mercer:

You are a niece of the plaintiff's mother?

A. Yes, sir.

Q. Her mother and your mother were sisters?

A. Yes, sir.

Q. And while your aunt lived you were frequently in the Smith home?

A. Yes, sir.

Q. After the defendant was married to Mr. Smith were you as frequently there?

A. Not so frequently.

Q. You, of course, were married to Mr. Hartzell

during the years, or a great many of the years you lived in Minneapolis?

A. No, I was not. We were just married in 1901.

Q. In 1901. But you had lived there?

A. I had lived there though before.

Q. But you of course both lived there together until he came west at the time he said?

A. Yes, sir.

Q. That is the point I wanted, Mrs. Hartzell. Now, I understood you to say you never had any conversation with Mrs. Smith, the defendant here, Mrs. Wallace, with respect to any matter of any will, or providing for those boys, or for Bess?

A. None about the will. The boys were mentioned.

Q. But none about any future provision for the boys?

A. Yes.

Q. What was that?

A. Well, she said that she understood what P. B. had wished, and she intended to carry out his wishes regarding the boys.

Q. When was this?

A. It was very soon after his death.

COURT: With whom was that—that was Mrs. Smith?

A. With Mrs. Smith, yes.

COURT: Where was that conversation?

A. At her home.

Q. Who was present?

A. My husband and myself and Mrs. Smith, and that is all.

Q. Your husband, who has just been on the witness stand, was present at such a conversation as that?

A. Yes, sir.

Q. Did you know that Bess so annoyed Mr. Smith by her conduct for some time that he would occasionally break down and cry, and call in his friends, and ask them to refute the stories that she was telling?

A. I did not. I never heard of that.

Q. You understood, during the time that the plaintiff was away, after the marriage to the defendant, that she was on the stage?

A. Yes.

Q. You understood that while she was on the stage Mr. Smith contributed a portion of the amount necessary to support her?

A. Yes, sir.

Q. You understood that he provided a nurse for the children while they lived there in the home?

A. Yes.

Q. And that the nurse lived there in the home with the defendant and Mr. Smith while the plaintiff was away?

A. Yes, sir.

Q. And you understood that there subsequently came a time when the plaintiff returned from the stage and went to Ohio to live with some of your relatives, to visit with some of your relatives?

A. To visit, yes.

Q. You understood that the plaintiff then went west into Washington or Oregon with the children to live?

A. Yes.

Q. And to move entirely away from Mr. Smith's home?

A. Yes, sir.

Q. Now, at the time of this conversation which you say occurred in 1900 the plaintiff had a husband named Donald McLean, didn't she?

Q. He was living there with Mr. Smith?

A. Yes, sir.

Q. Shortly after the plaintiff's mother died Donald MacLean and the plaintiff, and their son Donald, the oldest boy, came back and lived in the home of Mr. Smith?

A. Yes, sir.

Q. While he was a widower?

A. Yes, sir.

Q. Now, Dr. MacLean started in to practice medicine there, you understood that?

A. I didn't know anything about that.

Q. You didn't know anything about that?

A. No.

Q. You didn't know anything about the terms, then, on which they came back there?

A. No, I didn't.

Q. Mrs. Smith was not present at any conversation which you had with Mr. Smith, was she, about Bess?

A. I don't recall. She might have been at times.

Q. You don't remember of any, do you?

A. No.

Q. You don't remember of any time when Mrs.

Smith was present when you had a conversation about the boys?

A. No, not particularly. She might have been in the room or not. I don't recall.

Q. You don't recall that she was?

A. No, sir.

Q. The plaintiff's father was alive during all these years?

A. Yes, sir.

Q. He is alive yet?

A. Yes, sir.

Q. Donald MacLean, as you understand, is still alive?

A. Yes, sir.

Q. The father of these boys?

A. Yes, sir.

Q. At the time when you say Mr. and Mrs. Smith were in California, the plaintiff had been married to Mr. Price, and was living with him, as you understood it?

A. Yes, sir.

Q. And the boys were living with the two of them?

A. Yes, sir.

Q. The plaintiff sometimes lived with her father, didn't she?

A. Not after she went to California.

Q. Before she went to California?

A. Before she went to California.

Q. Did she take a trip to Europe with her father?

A. Yes, sir. Oh, I misunderstood. You meant with Mr. Ailes, her father?

Q. I said her father.

A. We always spoke of Mr. Smith as her father, and I got it mixed up.

Mr. Mercer: I move to strike out what she understood.

Q. I am speaking of her father.

A. She didn't live with her father that I know of at any time.

Q. Didn't she go to Europe with him?

A. She went to Europe on a trip.

Q. She married while she was over there?

A. Yes, sir.

Q. Mr. Smith was at home?

A. Yes, sir.

Q. Mrs. Smith was at home?

A. Yes, sir.

Q. Her own mother?

A. Yes, sir.

Q. She was married at California to the second husband, wasn't she?

A. Yes, sir.

Q. Mr. Smith was in Minneapolis?

A. Yes, sir.

Q. You understood that Mr. Smith knew neither of those men to whom she was married personally at the time she married them, didn't you?

A. Yes, sir.

Q. Now, do you know whether or not Ned Price after he was married to the plaintiff adopted the children?

A. I never heard of that?

Q. You never knew of that?

A. I never heard of it, no, sir.

Mr. Hallam. It is admitted that he did.

Mr. Mercer: Price adopted the children legally, didn't he?

Mr. Hallam: Yes.

Mr. Mercer: And that was soon after he married her.

Mr. Hallam: I think so.

Q. This trip you mention in which you say something about a visit of Mr. and Mrs. Smith, you understood that that was the time Mr. Smith went to the Hawaiian Islands or Japan, and came back through California?

A. Yes, sir.

Q. He just stopped on the way?

A. Yes, sir.

Q. Now, did you know that before the plaintiff and her boys went west to live Mr. Smith tried to get some of her own relatives to take them, and offered to assist in paying the expenses if they would only take them out of his home?

A. Yes, sir.

Q. Did he try to get you to do it?

A. No, sir.

Q. He tried to get your aunt, did he not?

A. Yes.

Q. Did he try to get your mother also, as you understood?

A. I didn't understand that.

Q. And you understood that Bess's own relatives

didn't want to undertake to keep them even though Mr. Smith paid, didn't you?

A. Yes, that aunt that he asked.

Q. Yes.

A. There are reasons for that though—good reasons.

Q. Beg your pardon?

A. I say she had good reasons for that. She was a business woman, I mean, and was not at home.

Q. You never had any more definite conversations with Mr. Smith about any of these matters than what you have told?

A. No.

Q. Nor with Mrs. Smith?

A. I didn't have any with Mrs. Smith.

REDIRECT EXAMINATION.

Q. You said a few moments ago, in answer to a question of counsel, that there were good reasons why your relatives didn't want to take Bessie and the boys, as I understood you. Will you tell what those reasons were, if you know?

A. The aunt, as I understood it, whom he requested, or asked her if she wouldn't take care of the boys—I didn't understand that Bessie was to be with them; I understood that he asked her if she would take the boys home, provide for them; but she was a nurse, and was away from home a great deal, and felt that she could not give up her business to take the boys.

COURT: That was her reason, not his.

A. Yes, sir.

Mr. Mercer: That is why I didn't hardly think that was material—I didn't pursue it any further.

COURT: Yes.

Q. You said, in answer to one of the questions, that you heard a conversation of the defendant after she married Mr. Smith, or some remark with reference to her understanding his intentions under the will?

A. Yes, sir.

Q. Do I understand that that occurred at his house?

A. Yes, sir.

Q. Was it in a conversation between you and the defendant?

A. Yes, sir.

Q. Was there any one else present, do you remember?

A. Just my husband.

Q. Now, have you stated that conversation in full, or will you state now what was said there?

COURT: I think she has been over that.

Mr. Hallam: Well, I think so.

COURT: If there is anything additional, it is all right. I do not want to take up the time of the court going over the same thing. Did you state that in full at that time?

A. Yes, sir.

Q. By what name, if you know, was the complainant generally known in Mr. Smith's family after her mother's death and after she resided there with the children?

Mr. Mercer: I believe the answer admits that she

was known considerable of the time by the name of Smith, but her own friends and relatives knew what her actual name was, doesn't it?

COURT: Is that admitted?

Mr. Mercer: In that way.

Mr. Hallam: It is not fully admitted. It is not as fully as alleged.

COURT: You may answer that question.

A. After her mother's death and her divorce, she still went by the name of MacLean, if that is what you mean.

Q. That was after the marriage?

A. You mean before her marriage, when she lived with them, do you mean?

Q. I will ask you now, during the time that her mother was alive, after her mother married Mr. Smith, by what name was she generally known, if you know?

A. Elizabeth Smith.

Q. Was she known by any other name so far as you are aware?

A. Not after her mother married Mr. Smith.

RE CROSS EXAMINATION.

Q. While Mr. Smith and your aunt were living together, she was frequently called Bessie Smith, wasn't she?

A. That is all I ever heard her called.

Q. She went to Europe, did she not, under the name of Ailes, with her own father, as you understood it?

A. No, sir, I didn't understand.

COURT: What was that name?

Mr. Mercer: Ailes.

COURT: That was your aunt's name under her former marriage?

A. Yes, sir.

Q. All the relatives always knew what her actual name was, didn't they?

A. Yes, sir.

Q. As Ailes?

A. Yes, sir.

Q. You knew?

A. Yes, sir.

REDIRECT EXAMINATION.

Q. Do you know anything further about the circumstances of Bessie's trip to Europe, when she was married, than you have stated in your testimony—any more circumstances in regard to that than you have stated?

A. No, sir.

Excused.

ELIZEBETH M. PRICE.

Called as a witness in her own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Hallam.

Mrs. Price, you are the complainant in this suit?

A. Yes.

Q. What is your age?

A. 36.

Q. When was your last birthday?

A. The 14th of this month.

Q. Do you remember the occasion of the marriage of your mother and Mr. Smith?

A. Very well.

Q. Do you remember what year that was?

Mr. Mercer: Isn't that all admitted by the pleadings, Mr. Hallam?

Mr. Hallam: I think that year is admitted. 1893.

COURT: 1893 was the time, was it?

A. Yes, sir.

Mr. Mercer: It is admitted.

Q. At that time you were 14?

A. Yes, sir.

Q. Had you known Mr. Smith prior to his marriage to your mother?

A. Yes.

Q. About how long, if you remember, had you known him before their marriage?

A. Well, I can't tell just how long in years, but it had been a long time, because I always called him Uncle Peter.

Q. Well, never mind that. Just answer, to your best recollection, how long you had known him. You say it was several years, you think?

Mr. Mercer: If there is any materiality to this—it is away back, something that I cannot see has anything to do with this case.

COURT: You may answer generally how long you had known Mr. Smith before the marriage.

A. Quite a while. As a child I knew him.

Q. Do you remember how old you were when your mother was divorced from your father?

A. No.

Mr. Mercer: That is admitted in the pleadings, Mr. Hallam.

Mr. Hallam: I don't think the date of that is admitted.

Mr. Mercer: There won't be any question about it.

COURT: It is unnecessary to go into that further. It is enough to know they were divorced.

Mr. Mercer: That is admitted in the pleadings.

COURT: I don't see any other bearing that might have on the case.

Q. You remember the occasion of the marriage of your mother to Mr. Smith?

A. Yes, sir.

Q. Had they been keeping company for some time before that marriage?

Objected to as incompetent and immaterial.

COURT: You may answer that generally.

A. Yes.

Q. And in the course of that courtship you saw him frequently, did you?

A. Yes.

Q. Were you and your mother living in Minneapolis at that time?

A. Yes.

Q. Did you and your mother constitute the whole of your family at that time?

A. Yes.

Q. And you had become pretty well acquainted with Mr. Smith before the marriage?

A. Yes.

Q. And you said, I believe, you were in the habit of calling him Uncle Peter?

A. Yes.

Q. What did he call you?

A. Bessie.

Q. After the marriage, did your mother and Mr. Smith go on a wedding journey?

A. Yes.

Q. Did you go with them?

A. Yes.

Q. You were your mother's only child?

A. Yes.

Q. Were you the only child she ever had? Do you know as to that?

A. No. There was a child before me, but it died as an infant.

Q. Mr. Smith never had any children of his own?

A. No, not that I know of.

Q. After the marriage of your mother and Mr. Smith, did they reside together in Minneapolis?

Mr. Mercer: That is admitted in the answer that they did.

COURT: Did they?

A. Yes. I beg your pardon?

Q. And did you live with them?

A. Yes.

Q. You say they took a wedding trip after the marriage, and you went with them? Where did you go on that trip?

A. To Chicago, to the World's Fair.

Q. It was at the time that the World's Fair was in session?

A. Yes.

Q. Now, what, if anything, was said on the occasion of that trip by Mr. Smith to you in regard to your relation in the family?

Mr. Mercer: Objected to as irrelevant to any issue under the pleadings here, and on all the grounds on which I objected as to the evidence, on account of the nature of the answer, and the bar of estoppel, etc.

COURT: Is this alleged?

Mr. Hallam: Yes, it is alleged in the complaint that Mr. Smith, from the time of that marriage, took this complainant as his daughter; it was understood that she was to be his daughter; expressly so understood, and that was the family relation that existed during the succeeding years; and that is an important fact in contemplation of the equitable decisions, under the pleadings.

Mr. Mercer: I would like to have counsel point out the portions of the complaint to which he refers, because express permission was given them to amend, by stipulation, if they wanted to undertake to prove any adoption; and we understand that there is not an issue upon the question of adoption here as the matter stands.

Mr. Hallam: There is sufficient allegation in the complaint. The word adoption was not used. I am not seeking to show that the word adoption was used in

these conversations. It is not so alleged in the complaint.

Mr. Mercer: That is what I understood.

Mr. Hallam: There is a sufficient allegation in the complaint substantially to the same effect.

COURT: I understood you are relying upon an oral contract by which the children were adopted, or substantially so. Is that the relationship? I have not read this complaint yet.

Mr. Mercer: It is not that they were adopted. It is simply that there was an agreement to make a will.

COURT: Very well. Confine yourself to that, then.

Mr. Hallam: If your Honor please, we also rely upon the statements and conversations which occurred immediately after the marriage of Mr. Smith, which the complainant has alleged in the bill, and I think they are very fully and specifically stated, although the word adoption was not used.

Mr. Mercer: I call the court's attention to the fact that we don't understand that there is anything prior to this alleged agreement that could in any way affect it. We understand that they claim an agreement here in October, 1900, and that modification of that agreement in February, 1902. That we understand is their cause of action, if they have any.

COURT: That was an agreement to make a will, and not for adoption.

Mr. Hallam: Back of that we specifically state conversation—in fact, right after this marriage of Mr. Smith and the complainant's mother. We seek to

show by the evidence, within a large volume of equitable decisions, while the word "adoption" was not used, it was that in effect, and there are leading equitable decisions of the same kind where the word adoption was not used that hold it is a sacred obligation.

Mr. Mercer: In order that the court may have the matter in mind, if it be the contention that they are trying to prove contract with Mr. Smith while he was on this wedding trip, we certainly shall object that it is not alleged in this complaint in any way so as to make any contract, or any obligations of that sort. We were brought here on the contract specifically alleged to have been made, in both cases, in October, at a subsequent time, several years afterwards.

Recess taken until 2 P. M.

Portland, Oregon, June 22, 1915, 2 P. M.

ELIZEBETH M. PRICE.

Resumes the stand. Direct examination resumed.

(Question read.)

COURT: You are suing under this contract. It is proper that you should define the relation, by your witnesses, of these parties one to another, and their conduct one toward another, for the purpose, not of proving contract or establishing the contract, but to put the court in the position of the parties so as to determine what the contract was; and that is as far as I think you would be entitled to go, with regard to showing the relationship of these parties. But you must stand or fall by the contract. In other words, you cannot make a contract out of the conduct of the parties from the

simple relations one to another. I will receive this testimony for the purpose of showing the relationship of the parties, so as to put the court in the position of the parties when they made the contract, to aid the court in interpreting the contract.

Mr. Mercer: I suppose perhaps I ought to have the objection there that that would not be binding upon the defendant.

COURT: You may have that objection.

Mr. Mercer: May we have an exception?

COURT: Yes.

(Question read.)

A. Mr. Smith said that I was hereafter to be his daughter; I was to be his little girl, and that he was to be my father; that my name was to be Bessie Smith, and not Bessie Ailes any more.

Q. Well, can you state the circumstances any more fully under which he made that remark?

COURT: That was immediately after the marriage of your mother?

A. This was in the train going down; and the occasion for it was, I said something—

Q. Just a moment. You didn't understand the court's question.

COURT: Was that immediately after the marriage of your mother to Mr. Smith?

A. Very shortly after, on their wedding trip.

Q. Now, go on and tell.

A. I was speaking to my mother, and called her "Mother," and I turned to my dad, and called him—I said, "Isn't that so, Uncle Peter?" And then he took

me on his lap, and told me that I was not to call him Uncle Peter any more; that I was his little girl, and that my name was to be Bessie Smith instead of Bessie Ailes.

COURT: How old were you at that time?

A. 14.

Q. What was your answer as to your age?

A. 14.

Q. Do you recollect, or were you in the habit of taking trips from time to time with your mother and Mr. Smith?

A. Yes.

Q. Do you remember of how you were in the habit of registering at hotels?

A. "P. B. Smith, Wife and Daughter."

Q. I wish you would tell the court, in a general way, what Mr. Smith's manner towards you and treatment towards you were from the time of his marriage to your mother on.

Mr. Mercer: I think that may be rather a dangerous conclusion for an interested party. I would rather that specific things be brought out.

COURT: I will hear the testimony on that.

Exception allowed.

A. Will you repeat the question?

(Question read.)

A. Just exactly as a father, and he was—in fact, he was—I don't know what word I want to use—he was more lenient and indulgent to me than a great many fathers were with their own daughters; if that answers the question.

Q. Was he in the habit of kissing you and caressing you?

A. Yes.

Q. Did you have any regular habit of kissing him when he was leaving the house or when he came home?

A. Always.

Q. During those succeeding years?

A. Yes.

Q. And were your relations with him universally or uniformly cordial, as that of a daughter, or otherwise?

A. Unusually so.

Q. By what name did you customarily call him?

A. "Dad."

Q. And what did he ordinarily call you? Did he have any particular name for you—nickname or pet name?

A. He called me "Bess" or Betsy Bobbitt." That was his particular name for me.

Q. What name did you use in school and in church?

A. Elizabeth Smith. At the first, however, while I was younger, I was called "Bessie." When I got older I was called "Elizabeth," my name.

COURT: Under what name were you married to your first husband?

A. Ailes.

Q. That was in what year?

A. In 1899, in London.

Mr. Hallam: I will inquire into that presently. I will ask to have this marked.

Book marked "Complainant's Exhibit A."

Q. I show you Complainant's Exhibit "A," and

especially the first page of it, and will ask you what that it.

COURT: What is that?

Mr. Hallam: That is a schoolbook of hers, a present from one of her teachers, showing the name.

COURT: Show it to counsel.

Mr. Mercer: I don't see how that is material here. Counsel can read that little statement into the record, if he wants an exception to it, with the understanding that he doesn't need to put in the whole book. I object to it as immaterial under the pleadings.

COURT: Very well. You may read it in.

Mr. Hallam: I offer to show by the witness that Complainant's Exhibit "A" on the first page reads as follows: "Samedile. 5 November, 1898. Mademoiselle Elizabeth Smith, 106 East 16th St., Minneapolis, Minn." I offer to show by the witness that Complainant's Exhibit "A" is a present from a teacher of hers during this period from 1893 to 1899, when she was living in Mr. Smith's house.

COURT: Is the date on that?

Mr. Hallam: I think it is.

Mr. Mercer: November 5, 1898.

COURT: Did you receive that book as a present from your teacher?

A. Yes, sir.

COURT: And she wrote that?

A. Yes.

COURT: Very well. Let that be copied in.

Mr. Mercer: I want the objection to that that it

would not be binding upon the defendant; no foundation for it.

COURT: Very well. You may have your exception.

Q. State what Mr. Smith's habit was during these years from 1893 to 1899, when you were married, with regard to supplying you with money?

A. I never had any fixed allowance, but I always had plenty of spending money.

Q. And furnished to you by Mr. Smith?

A. Yes.

Q. Was he free in furnishing you with money?

A. Very.

Q. Furnished you with whatever you asked, or was he in the habit of offering, or what was the custom in that regard?

A. Why, I had almost everything I asked for.

Q. I mean in the way of money. I am speaking now particularly in the way of money.

A. Well, I always had plenty of spending money; more than the rest of the girls.

Q. And what in a general way was your custom in regard to dress during those years from 1893 to 1899, as to how you dressed?

Mr. Mercer: My exception goes to all this line of testimony?

COURT: Very well.

Q. Do you remember the question?

A. Yes, how I was dressed.

Q. Yes, in a general way, just your style and mode of dress, its expensiveness or otherwise.

A. Why, I was always well dressed, and tastefully dressed.

Q. And Mr. Smith—I have not asked you—did Mr. Smith supply you the expenses, or did your mother have means by which your expenses were paid, or were they paid by Mr. Smith?

A. They were paid by Mr. Smith.

COURT: In other words, Mr. Smith supported your mother well and you well?

A. Very well.

COURT: Well, I think that is enough on that subject.

Q. Didn't you attend a Young Ladies Seminary at any time?

A. I did at one time.

Q. I believe that is admitted in the answer. Yes.

Mr. Mercer: Oh, I think so. I think we admit in the answer that she had attended a Young Ladies' Seminary.

Q. Were you in the habit of attending places of entertainment, such as theaters, with your father, or with Mr. Smith and your mother?

A. Yes, sir.

Q. Frequently?

A. Yes.

Q. And did you join any club with them?

A. Why, yes, the Minnekada Club, I was a member.

Q. Just in general terms, what was the Minnekada Club?

A. A country club.

Q. At the lake?

A. At Lake Calhoun, I think.

Q. Do you remember when you joined that club?

A. We were charter members, the three of us.

Q. Do you remember how your name was entered as such charter member?

A. Elizabeth Smith.

Q. Now, coming down to 1899, that is the year you were married?

A. Yes.

Q. Will you tell the court the circumstances of that event? You took a trip to London with your natural father on that occasion?

A. Yes.

Q. Well, now, will you briefly as you can relate that circumstance to the court—the circumstance of your going and of your marriage?

COURT: That was with your own father?

A. This was with my own father.

COURT: What bearing has that on this case?

Mr. Hallam: Well, the defense seems to think it is important in their behalf, and I want to explain just what the whole circumstance of that was. The fact is—I think it is undisputed—that her own father was divorced from her mother at the time that she was six years old, and that from that time up to this occasion she had very little, if anything, to do with him, but she did when she made that trip.

COURT: This is just prior to the marriage between the mother and Mr. Smith, that she took this trip with her natural father?

Mr. Hallam: No, your Honor. This trip to England was in the year 1899—six years after the marriage of her father, and on the occasion of her marriage.

Mr. Mercer: While her own mother was still alive?

Mr. Hallam: Oh, yes, her own mother was still alive at that time.

COURT: I don't understand the importance of that here. I will hear what there is in it.

Q. Well, go ahead.

A. The circumstances of my going, and how it came up?

Q. Yes. How it came, how it occurred, and your marriage.

A. Well, I don't know just how it came up in the first place; but my own father, Mr. Ailes, wrote and asked if I might be permitted to take this trip with him—he was going over on business. It was discussed at the house, and I was very eager to go—a trip abroad—and my dad didn't want me to go; he didn't approve of it.

COURT: When you speak of your dad, whom do you mean?

A. Mr. Smith.

Q. You always use that term in talking to him?

A. Yes.

Mr. Mercer: The same as your father, I suppose.

A. I never called him anything but Papa Ailes—my own father.

Mr. Mercer: You called him Papa Ailes and Mr. Smith dad?

A. Yes. Dad didn't like the idea of my going—he

didn't like me to go with Papa Ailes. But mother seemed to favor it, inasmuch as it would be an experience, and as she said, she doubted very much if dad could ever cross the ocean, and she thought it would be of an educational value. So Dad consented that I should go.

COURT: You were then 20 years of age?

A. I was 19.

COURT: Had you finished your education at that time?

A. Yes.

COURT: What school did you attend?

A. I went to Lake Erie seminary near Cleveland, Ohio.

COURT: Did you graduate there?

A. No; I didn't graduate.

COURT: But you had finished your education at that time?

A. Well, yes, my school education.

COURT: Very well, proceed. Excuse me for interrupting.

Mr. Hallam: Certainly. I would be glad to have your Honor ask any questions.

Q. Go on and tell about this trip to London with your natural father.

A. I went to New York alone, and met him there. Papa Ailes I am speaking of now.

Q. Well, your mother and Mr. Smith consented to the trip, did they, finally?

A. Oh, yes, they consented finally for me to go.

Q. Did they furnish the expense or did Mr. Ailes?

A. Why, I think Dad furnished the money to New York.

Q. To New York. Well, go right on. You say you met Mr. Ailes?

A. I met Papa Ailes in New York. We sailed in just a day or so. This was in January, 1899. We just went to London. We were there just a little while.

COURT: How long were you gone on that trip?

A. On that trip, I was just about two months.

COURT: And your father furnished the expense of that trip?

A. Father Ailes.

COURT: Yes.

A. Yes, after I had gone on board the ship.

COURT: Did you have any other companion traveling with you?

A. Beg pardon?

COURT: Did you have any other companion except your father traveling with you?

A. No.

COURT: You returned in about two months

A. Yes. I was married in London. I was married over there.

COURT: That is the point you wanted to prove?

Mr. Hallam: I wanted to bring out the circumstance of that marriage.

Q. Was it on that trip that you met Dr. MacLean?

A. Yes.

Q. Did you meet him on the boat going over?

A. Yes.

Q. What name did you go under on that trip?

A. Why, after I had got to New York I went as Miss Ailes.

Q. What was the reason of that, if any?

A. On account of, well, the proprieties—the looks of the thing. Mr. Ailes was my own father—it seemed best that I should take his name on the trip.

Q. Now, you met Dr. MacLean on the ship going over to Europe?

A. Yes.

Q. And became acquainted with him?

A. Yes.

Q. And did you become engaged to marry him?

A. Yes, subject to my Dad and my Mother's approval.

Q. Well, did you communicate with them?

A. I did.

Q. Where were you—did you write them a letter?

A. Not on the ship.

Q. No, but where and when?

A. Immediately upon my arrival in London.

Q. Asking their permission to marry?

Mr. Mercer: Wait just a moment. If there is any letter that is in writing, we would like to have the letter.

COURT: Have you got the letter?

A. No.

COURT: It has been destroyed?

A. Why, I presume so, that is so many years ago; after Mother's death, all her papers were destroyed.

COURT: You simply requested that they give their consent?

A. Yes, I told them I had met the doctor and wished to marry him.

COURT: Had you their answer?

A. Yes, I received their answer.

COURT: Is that what you want to show?

Mr. Hallam: Yes, sir.

Q. Have you the letter here?

A. No, I have not.

Q. Do you remember when you saw it last?

A. Not since I was in London.

Mr. Mercer: Not since what?

A. Not since I received it.

COURT: What did you do with the letter?

A. I don't know. I didn't keep it. I didn't suppose it was necessary.

Q. Well, were you in fact married in London?

A. We were.

Q. And was Dr. MacLean then connected with the United States Army as surgeon?

A. Surgeon in the United States Army.

Q. Well, was he at the time that you were married?

A. No, he was not at the time. He had resigned from the service, but he was afterwards reinstated.

Q. Well, how soon afterwards?

A. While we were in London.

Q. And you were married in London in what time of the year—what month?

A. February 20th.

Q. And where did you go from there?

A. Immediately home, here to this country.

Q. To this country, but what point in this country?

A. We landed in New York, and the doctor was ordered to report at once to Washington, D. C.

Q. As a surgeon in the United States Army?

A. Yes, to get his commission.

Q. And then you went from New York to Washington?

A. To Washington.

Q. Did he receive his commission there?

A. He did.

Q. Where did you go next?

A. We were ordered to Savannah, Georgia, General Hospital.

Q. Did you go at once to Savannah, Georgia?

A. We did.

Q. About what time did you reach there?

Mr. Mercer: We admit in the answer that the doctor was stationed at various places in the country. I don't see how there is any materiality in the different places.

COURT: I don't see how it is material as to where they lived after that.

Mr. Hallam: I would like to bring up this:

Q. Did your mother visit you and the doctor at any time?

A. She came down very shortly after we were stationed at Savannah.

Q. She came down to Savannah?

A. Yes.

Q. And she made a visit with you there?

A. Yes.

Q. Did you and the doctor afterwards, and if so at what time, visit Minneapolis?

A. It was the next June, on my birthday, we had been ordered to the Presidio in San Francisco, and we applied for two weeks leave, which we spent at Minneapolis.

Mr. Mercer: What year was that, Mr. Hallam?

Q. I will ask the witness what year it was.

A. That was still 1900.

COURT: What year were you married?

A. 1899.

Mr. Mercer: Does she know what year she was married. That would be 1900.

A. 1900.

Mr. Hallam: I don't want the witness to become confused. Was this the summer following?

A. This is the following June.

Q. June following your marriage in February?

A. Yes.

Q. And you visited with your people with the doctor in Minneapolis?

A. Yes.

Q. In June, you say?

A. In June.

Q. And how long were you there?

A. We were there two weeks.

Q. Were you entertained by Mr. and Mrs. Smith during that time?

A. Certainly.

Q. And were any social functions given in your behalf?

A. Continually.

Mr. Mercer: I cannot see how there is any possible materiality to that.

Mr. Hallam: Showing they fully confirmed the marriage. I want to cover that—that is all.

Mr. Mercer: We haven't questioned that.

COURT: The marriage is admitted, and that will confirm itself, as far as that is concerned.

Mr. Hallam: I want to show their approval.

Mr. Mercer: We haven't questioned that they were married or that they were divorced.

Q. Now, where were you in the following winter?

A. At the Presidio, California.

Q. And where did you go from there?

COURT: I don't think it is necessary to follow that up.

Mr. Hallam: I want to bring out, for the purpose of showing the intimate relations, one particular incident that I am leading to now, and I will come right to it, your Honor: That they were later stationed at Honolulu in the winter of 1900, or 1899-1900, and that the complainant was then pregnant with child, and Mr. and Mrs. Smith made a voyage over there and stayed several months with them during that time.

COURT: You may show that voyage. It is not necessary to show where they were.

Mr. Hallam: I don't wish to follow all the steps.

Q. I will ask you to state to the court whether Mr. and Mrs. Smith visited you at Honolulu, and if so when?

A. Yes, they did.

Q. Was that in the winter or summer?

A. That was late in the winter and the early spring.

Q. Following your marriage? Was it the next spring after your marriage, or when?

A. Yes.

Q. Well, now, then, are you clear what year that would be that they visited you?

A. 1900.

Q. Early in 1900?

Mr. Wood: I think the witness is confused. I think she said she was married on February 20, 1900.

A. No, I was married in 1899. Donald was born in 1900.

Mr. Hallam: I so understood.

Mr. Wood: I have it wrong then. I have February 20, 1900.

Mr. Hallam: If she said 1900, I think she misspoke herself.

Mr. Mercer: At any rate the Mrs. Smith who visited her at that time was her own mother?

Mr. Hallam: Oh, yes, her own mother.

Q. How long, if you remember, did Mr. and Mrs. Smith stay at Honolulu?

A. Until after my eldest son was born.

Q. And when was he born?

A. March 8, 1900.

Q. Then where did they go? Where did Mr. and Mrs. Smith go after that?

COURT: The allegation of the complaint is she was married February 20, 1899.

Mr. Mercer: And that allegation is admitted in the

answer, and there are quite a number of these formal things that are admitted.

COURT: I think you may very well avoid inquiring about anything that is admitted.

Mr. Hallam: I shall endeavor to do that, your Honor. Sometimes I inadvertently fail to draw that distinction.

Q. You say they returned to Minneapolis shortly after the child was born?

A. Yes.

Q. Did you and the doctor continue in Honolulu for a time after that?

A. Yes.

Q. Then when, if at all, did you return to Minneapolis.

A. Why, after Dad had written to the Doctor that mother was very, very seriously ill, and that she needed me and wanted me, and that it was most important that I come home.

Q. Well, did you come home?

A. We came home as soon as possible.

Q. Did the Doctor come with you?

A. The Doctor came with me.

Q. And the child?

A. And the child.

Q. Can you relate any incident briefly as to Mr. Smith's relations and attentions there at that visit in Honolulu, while you were pregnant with the child, and those months while you were there?

Mr. Mercer: We admit it in here that Mr. Smith

treated her as well as a step-father would ordinarily treat a child.

COURT: I don't think it is necessary to repeat that, because we assume that it is so.

Mr. Hallam: Very well, your Honor.

Q. Now, coming down to your return to Minneapolis, you said your mother was very ill.

A. Yes.

Q. When did you reach Minneapolis?

A. On June 12, 1900.

Q. And you say the doctor and the child came with you?

A. I was not able to bring the baby alone, and I could not get a nurse.

Q. Did the doctor still hold his position, or had he resigned his position in the army?

A. He resigned in San Francisco.

Q. Now, did your mother die during that summer?

A. Yes.

Q. At what time?

A. That night. The night of June 12th.

Q. After you arrived?

A. Yes.

Q. Shortly after you arrived?

A. Yes.

Q. Did you and the doctor—it may be a little leading—did you and the doctor and the child then live in the house with Mr. Smith?

A. Yes.

Q. From that time on?

A. Yes.

Q. And who had charge of the house after your mother's death?

A. I did.

Q. How long did Dr. MacLean continue to so reside, or you and he together with the child, to so reside in Mr. Smith's house?

A. Until that fall, the following fall.

Q. Well, what month?

A. October, I think.

Q. Did the doctor go into business in Minneapolis?

A. He took a suite of offices and furnished them.

Q. In what building?

A. In the Medical Building.

Q. Did Mr. Smith co-operate with him in that, in any way?

A. Yes.

Q. Did Mr. Smith introduce him among his friends?

A. Yes, sir.

COURT: Had he resigned at that time?

A. Yes. At first he had applied for a leave of absence to bring me home with the baby, but he could not get it. He had had two weeks' leave, you see, in June preceding; and at that time the surgeons were very busy, and he could not get leave, so he resigned.

Q. Was anything said or done between Mr. Smith and you and Dr. MacLean, after your mother's death, with regard to making permanent arrangements for you and him to live in Minneapolis?

Mr. Mercer: If that is calling for a conclusion, I think it is improper. If he is calling for conversation, I would like to fix the record upon that matter.

COURT: Fix the time of that, and then let her state what he said.

Q. Was anything said, and if so when, as near as you can remember, between Mr. Smith and the doctor and you about your remaining permanently in Minneapolis?

Mr. Mercer: We object to that as an attempt to show a conversation with Mr. Smith, who has since died, and in Minnesota where the statute would prohibit an interested party from testifying to that sort of a conversation. Second, upon the ground that, under the pleadings here, the matter is *res judicata*. Third, that the complaint does not state any cause of action for any relief here in equity—and that I shall want to argue later; and that matter is outlawed, and four or five witnesses—at least four—who would have been material witnesses have died before this matter is brought up again.

COURT: Do you plead laches here?

Mr. Mercer: We plead what we thought pled laches.

COURT: Your objection will be overruled; you may have your exception.

Mr. Mercer: We plead among other things as laches that this matter was held up until Mrs. Smith could not elect to take under the statute the same property because it was too late when it was known that the plaintiff was going to make any claim.

(Exception allowed.)

Mr. Mercer: Now, was this in the spring when they

came, or was this in October, or when was it? I want to get that conversation.

Q. Well, at any time, and if so when, after you came and before October?

A. This was in June.

Q. Shortly after your mother's death?

A. Yes, very shortly after.

Q. What was said?

A. It was decided that Dr. MacLean and baby and I should stay there, and live with Dad, and keep house for him. He was very much broken up over my mother's death, the Doctor had resigned from the army in order to bring me home, thinking that my presence would prolong my mother's life a little longer.

Q. Prolong what?

A. My presence there—Dad insisted on my coming home, hoping that my presence there would delay my mother's death.

Q. What, if anything, was done in the way of looking for a house as a suitable residence for you and the doctor and your father?

Mr. Mercer: Before you go into that, if it won't interrupt you, the first question as to a permanent arrangement—is that what you meant to leave? The witness didn't say so. The first question was as to what was said about a permanent arrangement.

Mr. Hallam: I think the answer is to that effect, responsive to that question. I will ask the witness again.

Q. Was the conversation that you had about your and the doctor's staying there permanently with Mr. Smith?

A. Yes; that he had resigned, and he was to take up private practice in Minneapolis, and we were to live there.

COURT: You were to make your home with your father?

A. Yes, and the baby. He was very fond of the baby.

Q. Pursuant to that, was anything done about looking for a suitable house for you and the doctor and your father?

A. Yes. The doctor had found a suite of offices, and had them furnished, and the house that we had had before, he thought it would be better to get a larger one on account of the nursery.

COURT: Your father hadn't owned his home then?

A. No, we never owned our home.

COURT: Did you live at the hotel?

A. No, we rented a house.

COURT: I mean by your father, Mr. Smith.

A. Yes.

COURT: Your Dad?

A. Yes, we just had a rented house. We didn't own a house.

Mr. Mercer: It is admitted in the pleadings that he didn't own any real estate, if your Honor please.

A. But we intended to buy a home at that time, a larger home for the larger family, and we looked around a good deal in order to find a suitable house.

Q. I don't want to linger unduly, but can you specify any particular locations where you looked at houses?

COURT: I don't think that is material.

Mr. Hallam: Very well. I will withdraw that question.

Q. Now, at this time, when you were so looking to a permanent arrangement, was the relation between your Dad, as you colloquially called him, and the doctor cordial?

A. Yes.

Q. State whether or not friction afterwards arose between them.

A. Yes, it did.

Q. And can you state to the court briefly how that arose, any incidents great or small from which it grew, that you observed?

A. Well, it was not long before there was friction. The first serious thing—and yet it didn't seem serious at the time—Dad objected to some of the doctor's habits; he objected seriously to him smoking cigarettes, and that was a bone of contention first, until other things grew out of that.

COURT: What did that result in?

A. It resulted in their disagreeing about almost everything.

Q. And then that trouble culminated at what time, in what month, if you remember?

A. In October.

Q. And what was done at that time in regard to Dr. MacLean leaving Minneapolis? State if you know what part your father took in that. I mean Mr. Smith.

Mr. Mercer: The same objection goes to that line of testimony, and the same exception.

COURT: Yes.

A. Why, Dad insisted that he leave at once.

Q. Did he leave?

A. Yes.

Q. Now, what, if anything, was said or done about your going with him?

A. I wanted to go with him and take the baby. Dad wouldn't allow me to do so.

Q. You knew he had no means to support you, however, did you not?

A. Yes. But I thought we would get along somehow. But Dad refused to allow me even to consider going with the doctor; that he had no home and no way to care for us, and that I was his daughter, and that I absolutely could not go with Dr. MacLean; that I must stay with him.

Q. Let me ask you at this time, just briefly, during the years before you were married was Mr. Smith in the habit of calling you his daughter?

A. Always, invariably.

Q. Well, now, then, coming back to this occasion in October, 1900, what was the final outcome? What was done at the last when the doctor left, if anything, and said?

A. Well, I insisted upon going with the doctor up to the last moment, and the last thing, Dad took Baby Donald out of my arms, and said that if I was so foolish as to want to go with a man who had proven himself to be the sort of a man—that sort of a man—that I could not take the baby; that he would keep the baby; that I could go, but he would keep the child. So I thought the baby needed me more than the Doctor did, and I

stayed with the baby, hoping that the doctor would find a position and make a home for us later; that we could go to him then.

Q. You say Mr. Smith took the baby away from you and held it?

A. Yes, took the baby out of my arms.

Q. On the occasion when he was leaving?

A. Yes.

Q. And thereupon you remained and the doctor left?

A. The doctor left.

Q. And you stayed there with the baby from that time forward.

A. I did.

Q. For some time?

COURT: How long did you remain there after that?

A. I remained there until after he had married Mrs. Wallace.

COURT: His second marriage?

A. Yes.

Q. I am coming back, but I will ask you when that was that he married this defendant.

A. In May, 1903.

Q. Now, I don't want to lead or suggest, but are you sure you are correct as to the year? I think it is admitted in the pleadings it was 1902.

Mr. Mercer: It is admitted in the pleadings, Mr. Hallam, it was in May, 1902.

Mr. Hallam: May, 1902.

Q. Now, after the Doctor had gone, did you have

any conversation with Mr. Smith concerning the arrangement under which you were to stay there, or did he make any suggestions to you in that regard?

A. Yes, he did. We had a very important talk. He told me—

Mr. Mercer: I make the same objection I made a little while ago to this prior conversation.

Objection overruled. Exception allowed.

Q. Now, just let me ask you, if you remember the circumstance, when and where you had this conversation.

A. Yes. The first conversation we had after the Doctor left was the next evening. I was in the nursery, just getting the baby ready for bed. I was nursing him just before, putting him to sleep. That was early in the evening—about half past five, I think I put him to sleep at that time.

Q. You say you were nursing the baby?

A. Yes. And as I said, Dad was very very fond of the baby; he had never known a little one before; and he always came to the nursery first thing as soon as he came in the house. And he came up there, and I was crying—felt very badly. And Dad told me I ought not to grieve, I ought to be glad that I was rid of a man like that; that he would never be able to take care of the baby and me as he should do. Of course this was not all in sequence—this was as he walked up and down the floor. He told me that I was his daughter, and that it was my duty to him as my father, and my duty to the baby, to stay with him in the home that he had there, and to keep up the home and look after him, and that the sooner I

would consent to leave the Doctor—divorce him—make up my mind to give him up entirely, the better it would be for all of us. And it was the same evening that he, as I say, was walking up and down with his hands behind his back, and he said that if I would give him up entirely that everything he had would be mine when he had gone.

Mr. Mercer: Wait just a moment. If your Honor please, I move to strike out that part as not germane to anything in this complaint. There is no such contract as that alleged, that if she would break up with her husband he would give her his property. That would be, of course, an illegal consideration to start on. There is nothing of that kind alleged in the complaint.

COURT: I will take the testimony, and determine that question after.

Exception allowed.

Q. What did you say, if anything?

A. I don't think I said much of anything then.

Q. Well, what did you say, if you remember?

A. I remember that I said that I thought the Doctor would be able to care for us soon, and that I would not give him up.

COURT: You did not consent to give him up?

A. I did not consent.

Q. Was that about all the conversation that evening?

A. I think that was about all that evening. As I said, I was feeling very badly, and he repeated it so many times, that I should be glad to be rid of him and that he cared for us, and that we were the only things he had

left; after my mother's death, he said that I and the baby were all he had, and that we should stay home and take care of him, and give up all thought of going back to the doctor.

Q. You remained in the house?

A. I remained in the house.

Q. In charge as your mother had been?

A. In charge as my mother had been.

Q. Now, did you have any subsequent conversation along the same line?

A. Frequently we had conversation.

Mr. Mercer: Well, now, if there are any conversations, let us have them fixed; if there is anything you claim any contract on, let us know where it is and what it is.

Mr. Hallam: Yes, I am going to.

Q. Now, you can specify each particular conversation, when you had them, or how frequently they came.

A. Well, my Dad was disappointed that I still had any thought whatever of going back to the doctor, and in the morning, almost the first thing he would say, he would come in the dining-room to the table, and he would say, "Well, Bess, are you going to give up this man?" I would say, "No," and that would perhaps drop. Then he would say another time, "Have you come to your senses yet?" He was just continually banging away at me all the time, and saying continually that when I would give up this man, who had proven himself no good and in no position to take care of the baby and me, that everything he had would be ours. He repeated that over and over and over again all during this time.

Q. Meantime you were pregnant with your second child?

A. Yes.

Q. From what time were you pregnant with him? When was he born?

A. In July.

Q. Of what year?

A. 1901.

Q. How long did that state of affairs go on?

A. That continued until that fall, I would not consent to give up all thought of the doctor.

Mr. Wood: Which fall do you mean?

Q. Well, this started in the fall, as I understand, in October, when the Doctor left.

A. I mean to say it continued all that winter until the following spring.

Q. And go right on and tell what further was said between you.

A. And finally—my health was very, very poor, and finally, I think it was in the last of April or the first part of May—this is 1901—I couldn't stand it any longer; I was very miserable and unhealthy; and I said to Dad, "All right, go ahead and get the divorce." He did. And then I accepted. Then is when I accepted, that I would stay—gave up all thought of going to the doctor, decided that I would stay and make my home the rest of my life, as I thought, there in my home.

Q. You did that in answer to his repeated requests and suggestions, or otherwise?

Mr. Mercer: Objected to. I think that is an improper question. Let the witness tell what she told Mr. Smith.

COURT: I think it would be better not to lead the witness.

Mr. Hallam: Very well, your Honor.

Q. The divorce was obtained?

A. A divorce was obtained.

Q. You say the second child was born in July—Robert?

A. Robert was born on July 9, 1901.

Q. Meanwhile you were remaining under the same relation?

A. Yes.

Q. Keeping charge of the home?

A. Yes.

Q. Robert was born there in Mr. Smith's home?

A. Yes.

Q. Under his roof. What was Mr. Smith's treatment of you at the time that the child was born, in a general way, as to being solicitous or otherwise?

Mr. Mercer: We admit his treatment was good. No question about that. We admit Mr. Smith treated anybody right when he had anything to do with them.

Mr. Hallam: All right.

Q. There is one circumstance I want to bring out in regard to the naming of this boy. What was said between you and Mr. Smith in regard to that?

Mr. Mercer: Objected to as immaterial to any issue in this case.

Mr. Hallam: I think that is material.

COURT: You may answer that question.

A. I had no boy's name ready for him.

Q. Did you have a girl's name ready?

A. Yes. So I suggested naming him Peter. He didn't think that was a proper name for such a little thing, and suggested naming it after me, naming it Bob.

Q. Because that was the nickname he had for you?

A. Yes.

Q. So he was called Robert?

A. Yes.

Q. Then, do I understand that you were the head and mistress of your father's home from the time that your mother died down to the time that he married the defendant?

Mr. Mercer: Now, do you mean the housekeeper?

Mr. Hallam: In charge in the same manner as her mother was.

Mr. Mercer: I think that is open to conclusion. I think the witness ought to tell what she did there.

COURT: That is a conclusion. State what she did.

Q. I will withdraw the question, and ask you what your relation was in the house from the time of your mother's death down to the time of Mr. Smith's marriage to the defendant.

A. What my relation was?

Mr. Mercer: What she did.

Q. What your status was in the house.

A. Why, I didn't do any housework, the manual part of it, at all. I simply decided what the meals were to be, and what was necessary for the house. I had a maid, whom my mother had trained, who then became housekeeper, the working housekeeper of the house. I had none of those duties.

COURT: You managed the affairs of the house as your mother had prior to that time?

A. Well, yes, in as far as I could; but my mother had trained Emily; that was our maid. After that I went on as far as I could, as my mother had done.

Mr. Hallam: I will ask to have this photograph marked for identification.

Marked "Complainant's Identification B."

Q. I show you complainant's Exhibit B and ask you if you know what that is.

A. Yes.

Q. What is it?

A. A photograph of my mother and myself.

Q. Taken about what time, if you know?

A. About 1898—'97 or '98. I must have been about 17 or 18. I can't remember the date.

Q. That was before you were married?

Mr. Mercer: What relation can that have to this case?

Mr. Hallam: It may be of very great importance, but it seems to me it throws some light on the situation.

Mr. Mercer: I object to that as irrelevant to any issue in this case.

COURT: Who had the photograph taken?

A. Why, we did.

COURT: I don't think that is material.

Mr. Hallam: Very well. Note an exception, please.

Q. Before this divorce was obtained, were you in communication at all with Dr. MacLean?

A. Yes.

Q. About how frequently, if at all, if you know, if you remember?

A. I don't remember how frequently.

Q. Until the time that you consented to this divorce, you were contemplating renewing your marriage relations with him?

A. Yes.

Q. Consented to the bringing of this proceeding. After you consented to begin these divorce proceedings, as you have testified, did you continue your correspondence with the Doctor?

A. Not after I had written him as to my intention.

Q. Did you in any subsequent years renew that correspondence with him?

A. Several years after.

COURT: I don't see what that has to do with it.

Mr. Hallam: I don't suppose subsequent correspondence has.

Q. Did you tell Mr. Smith, or did Mr. Smith know, you were corresponding with him, or do you know as to that?

A. Why, I don't know.

Q. Did you tell him you were not corresponding with him?

A. No.

Q. Make any statement to him with reference to that?

A. No.

Q. But you hadn't up to then consented to break off your relations with him?

A. No.

Q. Now, do you remember the occasion when the defendant at any time was a visitor and guest at your house in Minneapolis subsequent to these events that you have been relating?

A. Yes.

Mr. Mercer: May the objection which I made go to the line of testimony with respect to the defendant?

COURT: Very well. You may have the same objection and exception.

Q. One thing I overlooked. Was Mr. Smith in the habit or not of introducing you as his daughter during your girlhood?

Mr. Mercer: She has already been over that.

COURT: She testified to that already.

Mr. Hallam: I had forgotten that she did.

Q. Coming down to the last question, I think you said you did remember such a visit from the defendant.

A. Yes.

Q. I will ask you if you remember when you first met the defendant.

A. Yes.

Q. Do you remember the occasion?

A. Very well.

Q. Will you state to the court that occasion and the circumstances, if you remember.

A. Dad telephoned to me—it was in the morning some time; he had gone down to the office—he telephoned me and said that some old friends of his were in town and that he would like to invite them out to lunch, and could I come down.

Q. Telephoned you at the house?

A. At the house. And I said, "Yes, certainly." I was in the habit of entertaining any friends of Dad's.

Mr. Mercer: You said that?

Q. Do you mean you said that?

A. No.

Q. You are simply saying it now?

Mr. Mercer: Just hold her to the conversation as much as you can, Mr. Hallam.

Mr. Hallam: Yes, I will endeavor to do that.

Q. Before that, can you fix about the time of this occasion when you first met her, that you are coming to?

A. I cannot be sure, but I think it was late in the summer or early in the fall of—

Q. It is admitted in this case that the marriage of the defendant and Mr. Smith was in May, 1902. Now, I will ask you in reference to that.

Mr. Mercer: I will tell you quite a number of other things that are admitted, if you like, so we don't have any question about them.

Mr. Hallam: I am asking her in reference to that.

Mr. Mercer: I have made a short statement here of the admissions in the pleadings, which I will read. It is not exactly in the words, but it is as they appear. The pleadings admit:

1. That plaintiff spent considerable time in Minneapolis during the last four years, as she alleged.

2. Defendant is a citizen and resident of Portland, Oregon.

3. That plaintiff is 35 years old and the daughter

of Lyman and Lillie D. Ailes; the former still living, the latter died in June, 1900.

4. Plaintiff's mother was divorced from her father, and married P. B. Smith on the 12th of July, 1893, and lived with him until her death.

5. That from the marriage of the plaintiff's mother to P. B. Smith until her marriage to MacLean she lived with them most of the time and was sometimes called "Smith."

6. That plaintiff married Donald MacLean in London, in February, 1899.

(b) There were two children, as it is claimed here, by that marriage.

(c) That MacLean was stationed at various points unknown to the defendant in the United States Army.

(d) That plaintiff returned to Minneapolis to visit her sick mother when her mother was ill, and that plaintiff was more or less with her mother in her last illness.

8. That in effect MacLean left Minneapolis after becoming involved in some unpleasant affair.

That defendant married Peter B. Smith in May, 1902, and for some months afterwards plaintiff and her children resided with and were supported by them.

That on the return of the plaintiff from the stage in 1903 she resided with them for some months; again, in August, 1905, plaintiff was married to Mr. Price.

That Mr. Smith owned no real estate during the times in question, nor when he died, and that Mr. Smith died August 16, 1907, leaving personal property as listed in the complaint; that he left a will dated January 10,

1906, bequeathing all of his property to the defendant, and appointing her the sole executrix.

That on August 27, 1907, defendant petitioned the probate court for allowance of that will, and probate was granted on it.

That soon after September 1, 1907, plaintiff and her husband Price arrived in Minneapolis and visited defendant. That is, after Mr. Smith's death.

That the appraised value of the property turned over, we admit the appraised value of the property as they allege, as \$94,000.00, as found by the probate court, without the expenses being taken out; and that there was the Price note and two shares of worthless stock. That means that they allege in the complaint that there was other property, and we admit that this property was there, and that then there was a note of \$2000, to which was attached a memorandum from Mr. Smith that it should go to the plaintiff here, and which was given to her, as the evidence will develop, according to his wishes, after he died; and that there was a little worthless mining stock in addition to that.

Those things are all admitted. It doesn't seem to me we need take any time going into them.

Mr. Hallam: I will endeavor to avoid all those points that are admitted.

Q. Now, the marriage of Mr. Smith and the defendant was in May, 1902. Now, with reference to that time, can you remember approximately how long it was before that, this event you are now speaking of when you first met the defendant?

A. I think it was in the preceding fall.

Q. Now, are you clear, or is that your general recollection?

A. That is my general recollection.

Q. Well, in any event, go on and state what occurred at that time. You have stated he telephoned you.

A. He telephoned me, and I told dad, "Yes, certainly," I would be down. I asked where I was to meet them; if at the club at what time; and I was told to meet them in front of the Metropolitan theater at one or one-thirty. And I did so. I met Dad and Mrs. Wallace and her brother.

Q. Her brother?

A. Yes.

Q. Go on. What did you do? Did you go to lunch?

A. We went to lunch.

Q. The four of you?

A. The four of us—had lunch.

Q. You don't remember where you went to lunch?

A. Yes, we went to Shiek's.

Q. Then what occurred, if anything, after lunch?

A. Why, after lunch, Mrs. Wallace grew very congenial, and Dad had to go back to business, and Mrs. Wallace and her brother and myself went on—I don't remember the circumstances, but anyhow we went over to St. Paul. I went with them, just for the trip.

Q. Spent the afternoon and evening?

A. The rest of the afternoon. That was the first that I met them.

Q. From that time forward, after that first meeting with the defendant, state to the court whether you saw her occasionally and how often.

A. Why, yes, I saw her. I was very much attracted to her, and spoke about her to Dad, how very glad I was to have met her, and suggested having her visit us. Dad gave his approval immediately; he was very glad that I should do so. I don't remember whether I asked her then or not to visit me. I think I did. I think she visited us right then, though I am not sure.

Q. Do you recollect whether she visited you on more than one occasion at the house?

A. Yes, she was at the house twice as a visitor.

Q. Do you recollect how long she stayed on those occasions?

A. No, but she made a visit of several days or a week or so.

Q. Do you recollect whether Mr. Smith visited her at her home—which was then at Fargo, North Dakota?

A. Her home was at Fargo, North Dakota.

Q. Have you recollection as to that, whether Mr. Smith visited her?

A. Not that I know of.

Q. Do you remember the occasion of the defendant's engagement to marry Mr. Smith?

A. Yes.

Q. Do you recollect about when that was?

A. Yes, it was some time in the winter—let me see, they were married in May, 1902.

Q. Yes.

A. It was in the winter before that, preceding their wedding.

Q. Well, the occasion of their engagement to marry, you recollect?

A. Yes.

Q. And where did that occur, if you know?

A. It occurred at our home.

COURT: I don't think that is necessary in this case.

Mr. Hallam: We are coming right to a conversation in relation to that, your Honor, the morning after the engagement.

Mr. Mercer: They allege in their complaint something about a conversation that took place there.

COURT: Oh, very well.

Q. Now, at about the time that the engagement to marry was made between the defendant and Mr. Smith, did you have a conversation concerning that engagement, and concerning property matters, with Mr. Smith?

A. With Mr. Smith, yes.

Q. I will ask you when that was, with reference to the time that you learned of the engagement?

A. It was the morning that I learned of the engagement.

Q. Well, now, from whom did you learn of the engagement?

A. Mrs. Wallace.

Q. When did you learn of that?

A. That night.

Q. Well, did you have a conversation with Mrs.

Wallace when you learned of that engagement from her?

A. I did.

Q. Will you state to the court where that occurred?

Mr. Mercer: I will admit it was in the house there, if they had any conversation. Well, I don't know—I may not admit there was any conversation. Was it in Minneapolis, or was it in Fargo?

COURT: It was in Minneapolis, was it?

A. Yes, it was at my home.

COURT: State what was said then.

Mr. Mercer: May I have the same objection to that alleged conversation as to the October one, because it is plain, as I understand, that this conversation is a material one.

COURT: Yes, you may have the same objection and exception.

Q. Go on and answer the court's question.

COURT: Call attention to the conversation.

Q. The conversation had between you and the defendant at that time.

Mr. Mercer: That is alleged in the complaint, Mr. Hallam, if it is the one I think it is, as having taken place in January or February—I think February. Do you know when it was?

Q. I will ask the witness if you can remember just when that was, what month it was in. You said it was in the winter, as I recollect. Do you remember the month?

A. Yes, it was cold weather. I don't remember the month.

Mr. Mercer: I will fix that on cross examination.

COURT: Very well.

Q. What was the conversation between you and the defendant?

A. Why, she and Dad had gone either to a concert or to a lecture that evening, and I hadn't gone. I had remained home, and had gone to bed. And owing to our lack of room, Mrs. Wallace was rooming with me—shared my room. She wakened me, if I had been asleep—anyhow I was awake. She came to bed. She took me on her arm and told me that my Dad had asked her to be his wife. She furthermore said that she knew how fond I was of Dad and how fond he was of me and the children, and that she would never interfere with us in any way nor come between me and my Dad. We had a long talk, and she said that I was young—I was too young to have the responsibility of having the house and taking care of the house, with the maids, with the babies; that she thought it was too bad that I had married so young—that I had never had a young ladyhood—that I had simply jumped from girlhood to womanhood; and when she married Dad and came into the house that I would have much more freedom and time to enjoy myself. I was very fond of her. I thought myself—I was glad of anything that would make Dad happy—I was glad; and when she was so nice about it, saying that she knew how close the relationship was between my Dad and myself and my babies, and that she would never interfere, why, I think I told her how glad I was in a way;

that naturally it seemed odd to have any one take mother's place, but that it was all—I was glad.

Q. Now, that was about all of the talk?

A. That was about all.

Q. Now, I think you said the next morning a conversation occurred between you and your father.

Mr. Mercer: Note the same objection.

Same ruling and exception allowed.

Q. Go on and state to the court what was said between you and your Father next morning.

A. Next morning I was at the telephone in the dining room when Dad came down to breakfast, and he came up to me, and he put his arm around me and said he had something to say; that he had asked Dewey to be his wife. By "Dewey" I mean Mrs. Wallace.

Q. He used the word "Dewey," did he?

A. Yes.

Q. That was the common name used for the defendant?

A. Yes. To be his wife.

Mr. Mercer: A little louder.

A. That he had asked Dewey to be his wife. He had his arms around me then, and I think I felt rather badly in a way, to think that any one else would come and take mother's place; and Dad said, with tears in his eyes, "Now, Bess, I don't want you to think that any one could ever take your Mother's place." But he said that I was young, and should have my own friends, and that he needed a companion, and that there was no reason why we should not all live together and be very happy, and

it would give me more freedom; and, as long as Dewey and I were so fond of each other, that he thought we would all be happier with that arrangement. And I remember that I said, "Yes," I was glad for anything that would make him happier. All the time, of course, there was this little feeling that one could not very well help. And then he said that this would make some difference to me. He said, "Instead of you having everything I have when I am gone, you will have one-third, and the boys will have one-third, and Dewey will have one-third; but," he said, "I think we will have enough for all." That was practically all that was said, because it was rather a tense situation. And I said, "All right," and then we went to breakfast.

Q. Following that time, did you entertain the complainant (defendant) at your home in Minneapolis during the period of the engagement?

A. Certainly.

Q. On more than one occasion?

A. Why, she visited me, and came to Minneapolis for shopping.

Q. Did you give any social functions in her honor?

A. Yes.

Q. More than one?

A. Yes.

Q. At the house—at the home?

A. Yes.

Q. Did you attend the wedding?

A. Yes.

Q. At what place?

A. Fargo, North Dakota.

Q. Was anything said there to you about the execution of a will?

A. No.

Q. Was anything more said about property matters down to that time, or at that time to you by Mr. Smith or the defendant?

A. No, nothing more, just what he said the morning when he told me of the engagement.

Q. When did you first learn that he made a will at Fargo? When were you first informed that he had?

A. Why, just lately.

Q. Well, when do you mean by just lately?

A. Why, since I have been in Leavenworth, Washington.

Q. Well, specify more fully, if you can, if you remember when you were first told of that, and by whom.

A. Why, you mean now the first time that I heard of the will?

Q. The first time you ever heard of the will, yes.

A. Why, it was just April.

Q. In April?

A. Yes. I think it was just before the time set for the first trial.

Q. April of the present year?

A. Yes, April of the present year. Either March or April.

Mr. Mercer: Perhaps the Court's attention ought to be directed to the fact that that will about which counsel is inquiring was not the will that was probated, but was another will with different provisions, an earlier will.

Mr. Hallam: Oh, yes, I think I specified the first will.

COURT: Do you want to produce in evidence the first will or its contents?

Mr. Hallam: We expect to produce it, yes, your Honor. I will state in that regard that it has been introduced in evidence by the defendant in Minneapolis, in connection with their testimony, or stipulations there, and it is now on file.

Mr. Mercer: The execution of it is stipulated, and it is here in court: I didn't want to get the wills confused.

COURT: Was that made at the same time that the marriage took place?

Mr. Hallam: Yes, your Honor, at the time of the marriage or thereabouts, and at Fargo at her home. It was executed at Fargo, not Minneapolis.

COURT: What were the provisions of that will?

Mr. Hallam: The provisions of that will were to the effect that he gave \$5000 to this complainant and \$5000 in trust for the benefit of her two boys, in trust without bond, to the complainant and the defendant jointly, with the provision that if either of them died the survivor should be the trustee, to keep that and invest it for the benefit of the two boys, and for their education, etc.

COURT: What became of the balance of the property?

Mr. Mercer: It went to the defendant with the exception of a Chamber of Commerce membership that went to his nephew, Arthur Smith.

Q. Did you at the time of the wedding hear anything about any policy of insurance upon Mr. Smith's life for the benefit of the defendant?

A. No.

Q. When did you first hear of that? When were you first told that there was any such?

A. On, my former trip here, in April of this year.

Q. Now, up to this time you were still in charge of the home in Minneapolis?

A. Yes.

Q. After the wedding, did Mr. Smith and the defendant take a wedding trip?

A. Yes.

Q. Come west here to the coast?

A. Yes.

Q. Gone about how long?

A. Why, a couple of weeks, I should say. I don't know exactly. Two or three weeks.

Q. And meanwhile were you in charge of the home while they were gone?

A. Yes.

Q. You went back from Fargo to Minneapolis?

A. Yes.

Q. And resumed your usual duties there in the home at Minneapolis?

A. Yes.

Q. And after the wedding journey Mr. Smith and the defendant returned home?

A. Yes.

Q. And you lived there together for some time?

A. Yes.

Q. Now, how long did you all remain there in the home together?

A. Until, I think, it was September—yes, it must have been in September that I went on the stage.

Q. Before going on the stage—I want to come back though and ask you whether this arrangement was cordial and agreeable—the living together?

COURT: How long after the marriage was it you went on the stage?

A. Why, it was the following fall.

COURT: You stayed at home in the meantime?

A. Yes.

COURT: And your two boys?

A. Yes.

COURT: What was done with your two boys when you went on the stage?

A. They stayed there with my Dad and Mrs. Smith.

Q. How long did they continue to stay there?

A. Until I came back.

Q. When was that?

A. At the end of the season, in June—the first part of June or the last of May.

Q. Before going on the stage did you have a talk with your father about what you were to do?

A. Yes.

Q. Tell what that was and where it was.

A. It was down at his office.

Same objection. Same ruling and exception.

Q. That was shortly before you went on the stage, do I understand?

A. Yes.

Q. What did you say to him?

A. I went down to the office in the Chamber of Commerce, and I told him that I couldn't live that way any longer, and I asked him—in fact, I begged him to allow me to take the boys and get a little flat of our own, and take Emily, our maid, who had been with us for many years, to be the housekeeper, so that we could live, as I say, in an apartment or flat of our own, and near the house, where Dad could see the children every day going to and from the office. He refused. He said that that would not do at all. He said that my place was in his home; that I was his daughter, and that that was my place, in his home, and that it would cause talk; and he would not consider it at all that I should have a home of my own. Then I told him that I couldn't stand it any longer, that I was very unhappy, and that I just couldn't stand it, and that if he wouldn't allow us to do that that I would go and earn my own living. Dad was amused at that. He was provoked—very much provoked at the time, too. But he was amused, because he asked what I could do to earn my own living—made the remark I never dressed my own children, I think he said, and that he didn't know what I could do to earn a living. I told him that I would go on the stage. He asked what I could do then. I remember very well he said I wasn't very pretty—he couldn't see much what I could do. I told him that I could dance, and that I would go on the stage as a dancer, and then he didn't seem to think it was so absurd, because he knew I could dance, though I admit he didn't like the idea, but finally ended by saying, well, if I could get a position on the stage otherwise

than in the chorus, all right, I could try it. So I immediately proceeded to go ahead and try to secure a position.

Q. And you secured it?

A. I secured it.

Q. Of the kind that he specified?

A. Yes. At least it was in the chorus until two weeks after I had joined the company. But I had joined the company in the position which I eventually took, which was really not in the chorus.

Q. Was there something said about his giving you an allowance while you were on the stage?

A. That was his own suggestion—that I couldn't live on what I would earn on the stage; that I hadn't been accustomed to it, had never done it; and he said that he would give me an allowance beside what salary I should get. And he said that he didn't expect me to last out the first season; in fact, he was sure that I wouldn't last out the first season; and he said that he presumed that he would soon hear from me asking him for money to come home; he doubted that I could stick it out.

Q. You stayed through the season, did you?

A. I stayed through the season.

Q. Did he send you monthly allowances as he specified that he would?

A. He sent me weekly allowances.

Q. It was arranged that you were to leave the children at home?

A. It was arranged that I should leave the children at home.

Q. That they were in care of whom?

A. They were in care of—well, Dad and Mrs. Smith. They had a nurse girl.

Q. They had a nurse to take care of them?

A. Oh, yes.

Q. And you returned?

A. At the end of the theatrical season, on the last of May.

Q. What was done then, what was said between you and Mr. Smith or the defendant, if anything, about your future, what you were to do?

Same objection. Overruled. Exception allowed.

A. Why, I was to have \$100 a month, and I could take my children where I pleased. And I chose the West. It didn't make so much difference where just at that time, but I have always been very fond of the West, and I wanted to come back. But I don't know exactly who had made these plans, but anyhow I took my babies, and I went out to Tacoma, Wash., and boarded for a little while with some old friends.

Q. Was any arrangement made that you know of that your natural father, Mr. Ailes, was to pay anything toward your support?

A. Yes, I understood that to be so.

Q. Did you make that arrangement, or was it made by others?

A. No, it was made by others.

Q. What was that arrangement?

A. That Papa Ailes should give me so much a month—I think it was \$50 a month, but I cannot be sure; anyhow, he wasn't able to carry that out.

Mr. Mercer: I understand, without taking any time on that, Mr. Hallam, there was an arrangement there when she went away, that Mr. Smith and Mr. Ailes would each contribute \$50 a month, and that Mr. Ailes didn't keep it up very long, and that Mr. Smith paid the \$100 while they were living out there for awhile.

Mr. Hallam: That will be understood.

Mr. Mercer: I don't understand that that \$100 continued after she married Price. I think there was a modification then.

Mr. Hallam: Yes.

Q. How long did you remain at Tacoma, if you remember?

A. Well, the day after I arrived at Tacoma we were quarantined for diphtheria in the house where I was staying.

COURT: How long did you stay? We don't care for all these details.

A. I was trying to fix it. I should imagine about six weeks before the quarantine was lifted.

Q. Then where did you go from there?

A. I went to San Francisco.

Q. Did you live in San Francisco, in the city?

A. No, I only stayed there for a little while, and then I went down to a summer resort the rest of the summer.

Q. What summer resort was that?

A. Capitola.

Q. How long did you remain there?

A. Until the summer season was over.

COURT: You lived in Mill Valley?

A. I lived in Mill Valley up to 1908?

COURT: Then, what did you do?

A. I went back to Minneapolis with the children.

Mr. Hallam: Her intervening marriage, I think is admitted, 1905, occurred between her and Mr. Price, the son of the witness here this morning.

Mr. Mercer: And they continued to live there in Mill Valley for a considerable time together after the marriage.

COURT: Did your Dad contribute to your expenses after you were married?

A. To the children, yes.

COURT: How much?

A. \$50 a month.

COURT: How long did that continue?

A. Why, almost up to his death.

Q. Did he visit you at any time at Mill Valley?

A. Yes.

Q. More than once?

A. Yes.

Q. About when were the occasions of those two visits?

A. Well, the first one, I hadn't been there so very long. It must have been about a year, within a year since I had left home with the children, he and Mrs. Smith.

Q. The defendant?

A. The defendant.

Q. Yes, they both visited you?

A. Yes.

Q. And how long did they remain?

A. Well, they stayed over in San Francisco, but they visited back and forth. I don't know just exactly how long they were over in the city.

Q. Well, were your relations with him as pleasant as ever at that time?

A. Very, very pleasant.

Q. Did he seem fond of the boys?

A. Very fond of the boys.

Q. When was the next visit?

A. The next visit, I think, was after the earthquake.

Q. After the San Francisco earthquake?

A. The San Francisco earthquake.

Q. Shortly after?

A. I think very shortly after.

Q. You heard Mr. Price's testimony?

A. Yes.

Q. That is the visit to which you refer?

A. Yes.

Q. What was his conduct then toward you and the boys, as compared with the former visit and his former conduct?

A. Always the same; always devoted to the children—so glad to see them and so glad to see me.

Q. Did you observe his manner toward the children, taking them on his knee, kissing them, hugging them?

Mr. Mercer: They were small boys, weren't they?

Mr. Hallam: Small boys, yes.

Mr. Mercer: Why, certainly, anybody does that to a baby.

Mr. Hallam: Very well, I will withdraw that.

Q. Was that the last time you saw Mr. Smith?

A. That was the last time I saw him.

Mr. Hallam: It will probably save time. I have a series of letters, if your Honor please, I would like to show counsel, from Mr. Smith to the complainant, different dates, from February 27, 1904, down to March 1, 1907.

Mr. Mercer: What is the object of the letters? To show that they were friendly?

Mr. Hallam: That is one thing, to show that they were more than friendly; they were cordial with the relation of the most cordial character, and a like relation as between father and child, or grandchild between him and the children, and showing the remittances.

COURT: I think I will admit those letters for what they are worth, unless there is some objection.

Mr. Mercer: May it be understood that I may look them over after court adjourns, and then if I want to object specially to any of them, I will do it; but at the present time that the same objection applies to them as to oral conversations, so I won't have to take the court's time now?

COURT: Very well.

Marked "Plaintiff's Exhibits C, C1, C2, C3, C4, C5, C6, C7, C8, C9, C10."

COURT: They may be admitted, with the reservation that they may be objected to by counsel if he desires.

Q. Do you remember the occasion of Mr. Smith's death?

A. Yes.

Q. Do you know when he died?

A. Yes.

Q. Do you remember the date of that?

A. 1907.

Mr. Mercer: It is admitted in the pleadings, August 16, 1907.

Mr. Hallam: I will ask to have this telegram marked. Marked "Complainant's Exhibit D."

Q. I show you complainant's exhibit "D," and ask you if that is the telegram which you received announcing the death of Mr. Smith?

A. Yes.

COURT: That is admitted. Does that telegram have any further bearing on the question?

Mr. Hallam: Yes, it has a bearing.

Mr. Mercer: I object to it as immaterial. The death is admitted. What date was that?

Mr. Hallam: That is dated the 20th. The death was the 16th.

COURT: What is the object of putting that in? The death is admitted now.

Mr. Hallam: The object is this, your Honor: The death occurred on August 16th.

Mr. Mercer: Down East.

Mr. Hallam: Down East. New Hampshire, I guess. They brought the remains back to Minneapolis. This wire appears to have been dated at Minneapolis on the 20th, the day before the funeral, and was received on August 21st, Wednesday, the day of the funeral. That was the first account or report that she had.

COURT: You want to offer that, then, for the

purpose of showing neglect in advising her of her father's death?

Mr. Hallam: Yes, and circumstances surrounding and growing out of that incident.

Mr. Mercer: If it is material at all, if the Court rules it in, it will simply require us to show there was a strike on, and no telegram could be sent further east at that time.

COURT: I will admit the telegram. If it is necessary to explain the delay, it may be done.

Marked "Complainant's Exhibit D."

Mr. Hallam: I will ask to have this letter marked.

Marked for identification "Complainant's Ex. E."

Q. I show you Complainant's Exhibit "E," and ask you if that is a letter you received from Mrs. Jessie Carey Smith?

A. Yes.

Q. Was it about the date, the time the mails would carry the letter from Minneapolis to Mill Valley?

A. Yes.

COURT: Who is Jessie Carey Smith? What relation did she have?

Mr. Hallam: Well, your Honor, this telegram from the defendant indicates that letters would follow. Now, we expect to show, if there is any question, that this is the letter to which she referred. Jessie Carey Smith was a friend of the defendant, I believe, and is here in court, I believe, and this purports to have been written on behalf of the defendant, apparently in pursuance of this telegram, and there are matters therein which we think are worthy of notice in the case.

COURT: Who is Jessie Carey Smith? Any relation to the defendant?

A. No.

COURT: She purports to be a stenographer, and has a public office there, I presume.

Mr. Mercer: She was the wife of Mr. Smith's nephew. There is no question about that.

COURT: Well, that purports to have been written in behalf of the defendant.

Mr. Hallam: Yes.

COURT: There is no evidence here showing that the defendant authorized the letter to be written. You may have it marked for identification, and if you can establish it was authorized by the defendant to be written, in any event.

Mr. Mercer: And Jessie Carey Smith is here in the courtroom. We expect to put her on the stand, so if there is any question about that at the time, counsel can bring it out.

Q. Did you return to Minneapolis soon after Mr. Smith's death?

A. Yes.

Q. Do you remember about when you reached Minneapolis?

A. I don't know the date.

Q. Well, approximately. What month was it?

A. Why, it was the very last of August.

Mr. Mercer: We admit about the first of September in our answer, if that is satisfactory to you.

A. Certainly.

Mr. Hallam: No material difference in the record.

Q. Now, when you reached Minneapolis, did you visit the defendant at the Smith home?

A. Certainly.

Q. Did your husband go with you?

A. Yes.

Q. Mr. Price. Had the children been adopted as Mr. Price's children before this time?

A. Yes.

Q. Donald and Robert?

A. Yes.

COURT: They were adopted by your present husband?

A. Well, my husband, Mr. Price, is dead.

COURT: Oh, he is dead? The children were adopted by him?

A. By Mr. Price.

COURT: How did that come about? By your request?

A. No; at my Dad's request.

Mr. Mercer: You mean by Mr. Smith's request, now?

A. He wished it.

Q. Now, you stopped at the house a few days, you and your husband?

A. Yes.

Q. You were there as a guest, or at least you were there, whatever it may be called, you were there living at the house?

A. I was there in my own home.

Q. You were not living in any hotel, I mean?

A. No.

Q. You were stopping there at the house?

A. Yes.

Q. Now, did you have any conversation with the defendant at that time, or during the course of that visit, in regard to Mr. Smith's will?

Mr. Mercer: You mean in the presence of her own husband, or outside?

Mr. Hallam: In the presence of her husband, you say?

Q. Well, I will ask you whether the conversation that you had, if you had any, was in the presence of your husband? I don't know how it is material.

A. Why, no. I tried to. Mr. Price wanted me to bring up the subject, and I tried several times, when it was a favorable opportunity, but never found one.

Mr. Mercer: So that he was not there. That is the question I had in mind. Now, as to the conversation, let us have the same objection we had as to the conversation in January and February, and that they claim to have been made in October about the alleged contract.

COURT: Very well. You may have the same objection and exception. You may answer now and tell what was said.

A. Well, then, as I say, I tried to have a conversation with her about it, but never seemed to find a favorable opportunity. Finally one day I did have a talk with her, and we were alone. It was out on the porch. Shall I just continue?

Q. Yes. I will ask you, before that conversation,

did you know the contents of the will, or did you learn them?

A. Well, before the conversation I did. But I didn't know it until just before the conversation.

Q. How did you learn the contents of the will?

A. Mr. Price and I went down to the court house and looked at it.

Q. And then, shortly after that, you had the conversation at the house?

A. At the house.

Q. You say you were sitting on the porch?

A. Yes.

Q. And was any one present?

A. No.

Q. Did I understand you to say she was sitting on the porch and you approached her?

A. I had been waiting for an opportunity when there was no one else around, as it was a personal matter—family matter. And either I was sitting on the porch and she came out, or she was sitting on the porch and I came out. I know I thought then was the time when there were no strangers around, that I could broach the subject.

Q. Well, you broached the subject?

A. Yes.

Q. What did you say?

A. I told her that I had seen the will and that I was very much surprised that there had been no provision for me and the children, and further went on to say that I could not understand it—that I couldn't understand why there was no provision made for myself

and the children. And Dewey said yes, she was surprised also, and that she knew nothing about it; that she was also surprised; that she knew nothing whatever about the will, but she said she supposed that it had been made that way—it was very short and very brief—for business reasons; and she said she knew I was anxious to get back to the children in California, or else she said she supposed I was anxious; anyhow, that remark came up—and that she knew the agreement, and that I could go back to California, and not wait for the will to be probated.

COURT: What agreement?

A. Well, I presumed that she meant the agreement between my Dad and I that I was to have one-third and the boys were to have one-third. I took it to mean that, because I was speaking about the will, and said I was surprised that no mention had been made of us, or me. And that I could go back to California, back to Mill Valley, and she would send our share to us. That was all the conversation.

COURT: Did this will provide anything for you or your children?

A. Not mentioned in any way.

COURT: You were not mentioned in the last will?

A. Not mentioned. And I spoke of how surprised I was.

Mr. Hallam: The last will if your Honor please, simply gives all to the wife and names her sole executrix—a very brief will; the complainant and the children not in any manner mentioned.

COURT: Is that admitted?

Mr. Hallam: That is stipulated into the case, that is already on file.

Mr. Mercer: There is no question about the contents of that will. It is probated, and we have an exemplified copy attached to the deposition that was taken here by stipulation.

Q. Did you remain at the house after that conversation any length of time?

A. No, not any length of time. We left to go West.

Q. And you did go West with your husband soon after that?

A. Yes.

Q. Back to your home in California?

A. Yes.

Q. And how long did you remain in California after that return from Minneapolis? Did you go back to Minneapolis again later?

A. I went back the following year.

Q. Did you hear anything from the defendant during that time?

A. No, I never had heard from her during that time?

Q. Did you write to her?

A. Yes.

Q. You went back the following year to Minneapolis?

A. Yes.

Q. Did your husband go with you that time?

A. No.

Q. Did you and Mr. Price get along well?

Mr. Mercer: Wait just a moment. It is admitted there was a separation.

COURT: How does that affect this case?

Mr. Hallam: To explain how she went back home. It is only remotely important perhaps. This last visit she went back alone with the two children.

Mr. Mercer: We admit she went back alone, but I don't suppose you mean to attempt to show she ever spoke to Mrs. Smith about this matter.

Mr. Hallam: After her return?

Mr. Mercer: Yes.

Mr. Hallam: No, I think not. I think there was no conversation between them after that.

Q. You took the two children back with you, did you?

A. Yes.

Q. And you lived in Minneapolis from that time?

A. Yes.

Q. And soon after that the proceeding there was begun?

Mr. Mercer: Excuse me. I don't want to interrupt you. Doesn't she live now with her father down here in Washington or Oregon somewhere?

Mr. Hallam: Well, I am coming to that.

Q. Soon after that time that suit referred to in the pleadings was begun back there in Minneapolis?

A. Yes.

Q. What attorney did you consult?

Mr. Mercer: Just a moment. The suit was commenced—it was commenced in her name. If there is

any question about it here, I took the pains to get the original complaint out of the court, the original judgment record. I have it here in court.

(Question withdrawn.)

Q. Well, you took up a residence. What did you do? Did you go to work there? After you returned there, did you go into any employment?

Objected to as irrelevant and immaterial to any issue in this case.

COURT: I don't think that has anything to do with this case. You went to your father after your second husband died?

A. Only just lately. I earned my own living in Minneapolis. I went there. I have only just come out to Washington to visit here. I was in Minneapolis.

COURT: How long did you reside in Minneapolis?

A. Seven years, I think.

COURT: You earned your own living in Minneapolis?

A. Yes.

COURT: Then you came West?

A. I came West, yes.

COURT: You are with your father now?

A. I am staying with him. I am not living there permanently.

COURT: Is he remarried?

A. No.

COURT: I think that is enough about that history.

Mr. Hallam: Very well, your Honor. I would like to show a little about the relations, or rather lack of rela-

tion between the complainant and the defendant there in Minneapolis after her return.

COURT: Very well.

Q. After you returned to Minneapolis did the defendant reside there in Minneapolis for a time?

A. Yes.

Q. And then she removed West here to Portland?

A. Yes.

Q. Do you know about when she came west to Portland?

A. No, I don't.

Q. Well, is it several years ago or recently? Do you know as to that?

A. Why, I understand that she came west as soon as she married Mr. Wallace. I don't know just when that was. I imagine it is about four years.

Mr. Mercer: What relation can that have to this lawsuit?

Mr. Hallam: In connection with the old previous relation, the relations of these parties.

Mr. Mercer: The only relation is this, if your Honor please, as I understand the situation. The first that the defendant heard of the plaintiff being back there in Minneapolis is when she was sued in this case, and counsel says they don't claim that they had any conversations in the meantime. Now, naturally the defendant would not go and call on her or communicate after having this kind of a suit brought against her.

Q. Well, you placed that matter in the hands of your attorneys, and you acted in accordance with their advice in regard to that suit?

COURT: After the suit was begun?

Mr. Hallam: Yes, and after any proceedings in that matter had been discontinued.

Mr. Mercer: I don't see how that is material.

COURT: I don't see how that can have any effect here. They would not be expected to be very cordial after the suit was begun.

Mr. Hallam: I will note an exception to the last ruling of the court.

Q. When did you come west to Leavenworth, Washington?

A. Last August, 1914.

Q. Was that before or after you signed the bill in this suit? Where did you sign the bill in this suit?

A. In Minneapolis.

Q. At Mr. Jackson's office?

A. Yes.

Q. That was before you came west?

A. Yes.

Mr. Mercer: Mr. A. B. Jackson?

Mr. Hallam: A. B. Jackson.

Q. Have you taken up a permanent residence in Washington?

A. No.

COURT: That wouldn't make any difference, if she was a resident there at the time.

Mr. Mercer: It makes diversity.

COURT: I suppose you make no question of the jurisdiction of the court?

Mr. Mercer: We simply plead in our answer that, instead of her having lived in Minnesota at the time, she

lived in Washington with her father on his farm, and that is the only thing, but that would not disbar the jurisdiction as I understand.

COURT: You made no objection to the probate of the will in any way?

A. No, not after I had this talk with Mrs. Wallace.

Q. During those succeeding years in Minneapolis, what was your condition as to having means or being in a state of poverty?

Mr. Mercer: I don't see how that is material to this case.

COURT: You may answer that.

A. I didn't have any means except what I earned and what was given me.

Q. What was given you. Did you receive something from Dr. MacLean during those years?

COURT: I don't think that has anything to do with this case.

Mr. Mercer: We will admit she did if it is of any value. Dr. MacLean contributed to them, to the support of the boys.

Q. Have you kept the boys in school all the time or most of the time?

Objected to as immaterial.

COURT: That is not material. Dr. MacLean is not contributing to the support of the boys now?

A. Yes, he is.

Q. He has been more or less?

A. He has been up to the last month or so. He hasn't the last month.

Mr. Mercer: He does about once a month, doesn't he?

A. He has been lately, but he has not the last month.

COURT: That is within the last month that he has not—that you have not heard from him?

A. I have not heard from him since the case was postponed in April. He was on his way here, and I have not heard from him since then.

COURT: Has he taken any interest in this case?

A. Why, certainly, he has taken an interest in it on behalf of the children.

Q. I will ask you, Mrs. Price, who furnished the money to pay the expense of bringing Mr. Price here at that time to testify?

A. The Doctor.

Q. You mean this time?

Mr. Mercer: I understand the defendant did. I understood that the court ordered that the defendant pay that expense.

Mr. Hallam: It was refunded, but I mean to bring him here.

Mr. Mercer: I object to that as immaterial.

COURT: I think that is immaterial.

Mr. Hallam: May I have an exception?

COURT: Yes.

Q. I will ask you who has paid the expense, or furnished you money, if any one, to attend the present trial, you and your boys and Mr. Price?

Mr. Mercer: Objected to as immaterial.

COURT: That is not material.

Mr. Hallam: An exception, if the court please.

Q. Do you have the means of transportation for yourself and your boys here, and for Mr. Price?

A. No.

Mr. Mercer: Objected to. Just a moment. I move to strike that out.

COURT: I think that is immaterial too.

Mr. Hallam: If I may have the same exception.

CROSS EXAMINATION.

Questions by Mr. Mercer:

At the time Dr. MacLean left Minneapolis, he was in some difficulty was, he not?

A. Yes.

Q. Mr. Smith objected to the way he was raising money, didn't he?

A. Yes, I think so.

Q. And Mr. Smith told you that he was afraid for Dr. MacLean to stay there and raise money the way he was raising it, did he not?

A. Why, not that he was afraid to have him remain there. I don't remember that.

Q. You don't remember anything about that?

A. No.

Q. What was the difficulty which caused Dr. MacLean to leave?

A. Well, I don't know exactly all the details of that. They were kept from me. I only knew that the Doctor was in financial difficulties, and that he had raised money—I don't know for sure whether it was on notes, or just in what manner.

Q. You don't know whether it was on notes or checks?

A. I don't know just how it was.

COURT: Was he in disgrace?

A. Why, yes.

Q. And he was threatened with prosecution, wasn't he, at that time?

A. Well, not publicly threatened.

Q. But privately? Privately threatened with public prosecution, wasn't he?

A. Well, I think that would be what Dad's words were.

Q. Now, after Dr. MacLean left Minneapolis, you expected to go to him for something like a year, didn't you?

A. Nearly that, yes.

Q. You kept in correspondence with him?

A. Up to the time that I wrote him that I would get a divorce.

Q. You understood up to that time that he hadn't been able to get anything to do to make a living to support you?

A. That is what I understood.

Q. Did you understand that he was in trouble at the time that you wrote him that you had decided to get a divorce?

A. I think at that time he was in trouble, though I cannot be sure.

COURT: Did that trouble arise out of a transaction between your husband and your Dad—Mr. Smith?

A. Yes. But I didn't understand the first part.

COURT: Did that trouble that your husband was in arise—

A. Yes, I think it did.

COURT: Arose out of a transaction between Mr. Smith and your husband?

A. Oh, no, not the financial—not the money part.

Q. The money transaction arose between him and other people?

A. Yes. I don't like—I don't know that it was money transaction that brought him into trouble.

Q. Well, you finally concluded that Dr. MacLean wouldn't be able to support you and the children if you went to him, didn't you?

A. Yes, and I was tired.

Q. At the present time you are living on a fruit farm with your father?

A. I am staying there.

Q. You and the boys?

A. Yes.

Q. You have been there now something like a year?

A. Nearly a year.

Q. If I understand you correctly the talk which you say you had with Mr. Smith, when you say he urged you to get a divorce, and when you say the property matter was mentioned was before you filed your complaint for a divorce?

A. Yes.

Q. All of the conversations that you had with Mr. Smith respecting his desires to have you stay there were had before you filed that divorce complaint, were they

not, except those that you say took place at the time of his engagement and subsequently? Now, is that clear?

A. No, it is not quite clear.

Q. I want to be absolutely fair with you. You said in your testimony that on a number of occasions Mr. Smith said that he didn't think that Dr. MacLean would be able to take care of you?

A. Yes.

Q. Am I right about that? You came to that same conclusion, did you not, as a fact, before you made your application for divorce?

A. Yes.

Q. Now, you say that Mr. Smith told you—you say in your complaint, in effect, that Mr. Smith told you that if you went with Dr. MacLean he would not contribute anything to your support; that is, Mr. Smith would not contribute anything to your support? Is that right?

A. Yes.

Q. If I understood you correctly a while ago, in your testimony, you said in effect that Mr. Smith told you that if you stayed there he would do something by you in a property way?

A. Yes, if I would divorce the doctor.

Q. Did he only say that in connection with his statement that if you would divorce the doctor he would do it?

A. I wouldn't say that he used those very words invariably. He would change his way of speaking by saying, "Well, have you come to your senses and will

give up this man—make up your mind to give him up?" He didn't always use the word divorce.

Q. Well, was all of this talk which you say took place between you and Mr. Smith about what he would do if you did give him up had before the time when you filed your divorce complaint?

A. Not all the talk before. There was talk before I consented to divorce the doctor.

Q. Well, was there any talk about the property arrangement which you have mentioned after the time when you filed your divorce action and before the time when you say he announced his engagement to you?

A. Well, that was a thing that was more taken for granted, that he had changed very much since I consented to divorce the doctor. He asked if there was anything that he could do. He did everything in his power for me. And when I accepted the conditions that were made, I understood that that meant that when I gave up the doctor I should have everything.

Q. Well, now, at the time when you say you accepted was before you filed the divorce action?

A. Yes.

Q. Yes.

A. At the same time.

Q. And if you made any acceptance, then, of what you say was his proposition, it was before you started the divorce action?

A. Well, I think that when I started the divorce action was the same time that I accepted this proposition.

Q. You don't think it was after that that you accepted it?

A. I should think that the matter of accepting of divorcing the doctor would be accepted, I should think it would be the same time.

COURT: State what was done, what you said.

A. You mean what I said to my Dad?

COURT: Yes.

Q. We would like to hear that.

A. I told Dad all right.

Q. All right to what?

A. All right, I would accept it?

Q. Accept what?

A. His proposition to leave everything to me.

Q. Now, how did he put that proposition? I would like to have the exact words if you can give them.

A. I will give the exact words just as nearly as I can: "If you will give up this man, I will leave everything I have to you when I am gone." I think those are very close to the exact words.

Q. Nothing said about his marrying again?

A. Nothing whatever at that time.

Q. Do you remember whether there was anybody present in the room when you wrote the letter to Dr. MacLean telling him that you had decided to get a divorce?

A. Why, I am not sure, but I rather imagine that Mrs. Smith might have been there. She was with me a great deal of that time.

Q. That is Jessie Carey Smith?

A. Yes.

Q. And not Mrs. P. B. Smith?

A. No. Mrs. Jessie Carey Smith.

Adjourned until 10 A. M.

Portland, Oregon, June 23, 1915. 10 A. M.

ELIZABETH M. PRICE

Resumes the stand.

Cross Examination continued.

Q. You were 14 years old, as I understand you, when Mr. Smith and your mother were married?

A. Yes.

Q. From that time on, generally speaking, you lived with them until you married Dr. MacLean?

A. Yes.

Q. But the year that you married Dr. MacLean you took the European trip with your father?

A. Yes.

Q. That trip as I understood you, was taken under the name of Ailes?

A. Yes.

Q. Your own name?

A. After I arrived in New York.

Q. What is that?

A. I say, after I had joined my father.

Q. Now, how long had you been away from your mother and your step-father when you were married to Dr. MacLean?

A. Why, about six weeks, through January, and I was married the 20th of February.

Q. You were married in London?

A. I was married in London.

A. Was your own father at the wedding?

A. Yes.

Q. Did you ask his consent to your marriage?

A. I don't know as I asked his consent. I simply told him I was going to be married.

Q. Yes. And he knew in advance that you were going to be married?

A. That I was to be married?

Q. Yes.

A. Yes.

Q. Now, wasn't it a fact that the first that your mother or Mr. Smith knew of that marriage was when you cabled them for money to assist you to get home on?

A. No.

Q. Didn't you do that?

A. I did; but that was before I was married.

Q. Before you were married?

A. Yes.

Q. You cabled that you needed money to come home on?

A. I did.

Q. Did that cable tell them about your expectation of marrying?

A. No.

Q. You were planning to marry when you sent that cable?

A. I was plannig to be married, but not then, not in London. I was planning to be married at my home later.

Q. There was no promise upon the part of Mr. Smith at the time you married Dr. MacLean to make any contribution to you to support you and Dr. MacLean, was there?

A. At the time I was married?

Q. Yes.

A. No.

Q. Nothing of that kind was brought up, was it?

A. No.

Q. After you were married to Dr. MacLean, you went with him around to the various points where he was stationed in the army?

A. Yes.

Q. And continued to live with him as his wife until after he resigned from the army?

A. Yes.

Q. Now, Mr. Smith was a man who provided well for your mother while you were living with them?

A. Yes.

Q. And treated you as if you were a member of the family during that time?

A. As if I were his own daughter, yes.

Q. Did he treat you any different from what he did any of the other members of the family?

A. Why, certainly, he treated me differently; as a girl, naturally he treated me differently than he did any body else. I was the only child.

Q. You say he treated you as if you were his own child. You never had lived in the family with a man before since you were quite a small girl, had you?

A. No.

Q. And Mr. Smith treated you better than anybody else had ever treated you, didn't he, in the way of a man?

A. Yes.

Q. And Mr. Smith went along the regular course

of business, and provided for his family well, as a good husband should, didn't he?

A. Yes.

Q. And you speak of having joined the club. He and his wife joined the club, didn't they?

A. Certainly.

Q. And he made a contribution to the Minnikada Club, did he not, to help start it, and memberships were given to all three of you?

A. Well, I don't know as to that. I only know that we were charter members of the club.

Q. What did you say to Mr. Smith when you say you wrote him from London that you were going to marry?

A. Why, it was a letter both to my mother and Mr. Smith; and I told them that I had met the doctor, and that I loved him, and that I wished to marry.

Q. What did you say to Mr. Smith in that letter with respect to his consent to that marriage?

A. I simply asked both of their consents.

Q. To the marriage in London?

A. No.

Q. As a matter of fact, didn't you simply tell them, as you did your own father that you had met Dr. MacLean and that you expected to marry him?

A. I went into it more fully than that. I didn't say just those words.

Q. Well, but in substance, I mean.

A. And I hoped—

Q. You hoped they would not object?

A. I think something of that order. I don't remember the exact words.

Q. Now, when you came to marry Mr. Price, you were living in southern California?

A. I was living in Mill Valley, California.

Q. While you were living with Mr. Smith and your mother, and before you married Dr. MacLean, Mr. Smith gave you money occasionally for your expenses, without a regular allowance?

A. Yes, I always had money.

Q. Did he give it to you or did it come through your mother?

A. Why, through both.

Q. Generally how was it given?

A. I usually asked Dad for it.

Q. And did your mother have an allowance, do you know?

A. No.

Q. Your mother gave you money part of the time?

A. Occasionally.

Q. And sometimes you would ask Mr. Smith for some money?

A. Most generally I asked Dad for money.

Q. And sometimes he would give it to you?

A. Almost invariably he would give it to me.

Q. How long did it continue that he would almost invariably give you money when you would ask for it?

A. Why, right up to the very last.

Q. Never refused you any money?

A. I don't say he never refused me any money.

Q. When your mother and your father were in

Honolulu—you said they were there some time, your mother and Mr. Smith, visiting in Honolulu?

A. Yes.

Q. They were quarantined on the ship there, kept for some time, weren't they, out there in quarantine on the ship?

A. Why, I think the Bubonic plague had broken out then, and I think it was—they were not quarantined very long—a short time, I think, before they were allowed to sail from the port.

Q. Now, that was your own mother and not the defendant that was there at that time?

A. That was my own mother.

Q. And your own mother was suffering from cancer, wasn't she?

A. Yes.

Q. At that time?

A. Yes.

Q. Mr. Smith took her over there to see if it wouldn't improve her health?

A. Why, I hardly think that. They came over there to be with me when the baby was born. Mother was hardly in a condition to travel, I think, when they started.

Q. And you think it was your mother that wanted to come, don't you?

A. I think they both wanted to come.

Q. You think your mother did, don't you?

A. I know my mother did.

Q. And you understood at the time, did you not, that Mr. Smith went along to keep her from traveling alone on account of her condition?

A. No, I didn't think that.

Q. Mr. Smith as a business man attended very closely to business as a rule, didn't he?

A. Yes.

Q. In the language of the street, he was generally on the job, wasn't he?

A. Well, they often took trips. It was nothing unusual.

Q. They didn't take long trips, did they?

A. Oh, not particularly, but they would take trips when they wanted to.

Q. That is the first time they had been to Honolulu?

A. The first time they had been to Honolulu, yes.

Q. Now, after they left Honolulu and came back, they came home to Minneapolis?

A. Yes.

Q. Went home to Minneapolis. When your mother got very low Mr. Smith wired you to come home?

A. Well, he wrote letters, yes.

Q. Finally you and Dr. MacLean went?

A. Yes, sir.

Q. Dr. MacLean couldn't get a leave of absence, and you didn't want to go with the baby alone?

A. It was almost impossible for me to go with the baby alone.

Q. And therefore Dr. MacLean went with you?

A. Yes.

Q. And when he went, he resigned from the army in order to get away?

A. Yes.

Q. Now, your mother died shortly after you got there, as I understand it.

A. That night.

Q. And then after the question came up, did it not, as to what Dr. MacLean should do in order to earn a living for the two of you?

A. The question came up—well, it was hardly a question; it was simply an assertion on Dad's part that we were to stay with him and the doctor was to go there into private practice.

Q. Now, wait a moment. Let us let your counsel argue it, if you please. Just answer the questions. The question came up between you and Mr. Smith and Dr. MacLean, did it not, as to how Dr. MacLean would earn money for the support of himself and his family?

A. Why, no, I don't think that question ever came up.

Q. You don't think that was mentioned at all?

A. I don't say it was not mentioned at all; but it was not in that way.

Q. Didn't you and Dr. MacLean and Mr. Smith talk over the question of what was best for Dr. MacLean to do?

A. Why, I think it was taken rather as a matter of course that as long as he had resigned from the army he would go into private practice. He was a physician, and there was nothing else to be done.

Q. And that was usually understood among you, wasn't it?

A. Yes.

Q. Now, did not you and Mr. Smith and Dr. Mac-

Lean talk that matter over immediately after your mother's death, or within a short time after, and didn't Mr. Smith tell you that, if you wanted to stay there and Dr. MacLean attempted to establish a medical practice there, he would employ you as his housekeeper and would pay enough for you and the family to live on there with him; that is, pay and discharge all of the expenses of the family for a year, and let Dr. MacLean have everything he could earn to start his medical practice?

A. No.

Q. No such arrangement of that kind?

A. There was no such arrangement of that kind, to my knowledge, as you have put it, Mr. Mercer.

Q. Well, tell us what it was then.

A. There was no question that I know of, if we wanted to stay, that the Doctor was to start a practice. Dad asked us, and insisted upon our staying; that I was all that he had left, and the baby, and that we were to stay there, and I was to keep his house for him, and the doctor was to have an office and start his medical profession, private practice there. But there was no remark made "If we wanted to stay."

Q. There was no agreement made that if you wanted to stay, or if you would stay, that the household expenses of all of Dr. MacLean's family should be paid by Mr. Smith for one year, and that Dr. MacLean should have his full earnings to establish his medical practice?

A. Why, the household expenses were to be paid by Dad, and the Doctor was to start his private practice; but I don't think there was anything said about a limit to the time.

Q. You don't think there was any limit to the time?

A. I don't think so, Mr. Mercer.

Q. When you had your divorce action with Dr. MacLean, you and Peter B. Smith both gave evidence?

A. Yes, I think so.

Q. You had no other witnesses?

A. Yes, I had.

Q. Who else?

A. Mr. and Mrs. Hasey were there.

Q. Were they sworn?

A. I don't remember whether they were sworn or not.

Q. You made the complaint against Dr. MacLean in that case yourself, signed it?

A. I knew very little about the complaint. I signed it, but I don't believe I read it.

Q. You don't think you read it?

A. I don't think I read the complaint.

Q. Did you hear the testimony that was given at that trial on the arrangement between you and Peter B. Smith and Dr. MacLean?

A. I don't think there was much testimony given there.

Q. Did you give any testimony on that question?

A. I really don't remember the exact details of that.

Q. Well, if you did give any testimony, you told it as you then remembered it, didn't you?

A. As I say, I remember very little about that. I consented to the divorce, and then I had nothing whatever to do with it. Dad did everything that was nec-

essary. I remember signing a paper, and I remember that Dad asked Mr. and Mrs. Hasey to go with us to uphold me.

Q. So that, if there was any testimony given on that matter, it was given by Peter B. Smith, was it, in that trial?

A. As I say, I don't remember. I don't believe there was much testimony given.

Q. You don't know what was given?

A. I don't remember.

Q. You don't remember what Peter B. Smith said?

A. No.

Q. You don't remember what you said?

A. Not all of it, no.

Q. Do you remember that in your complaint in that case you set forth, without limitation as to time, in effect, that you had come on there to live with Peter B. Smith, and you would take care of his household, and he would support the family and allow the doctor to start in his medical profession?

A. That doesn't sound just the way it was stated.

Q. Do you remember how it was stated?

A. No, sir.

Q. Do you remember that in your complaint when I read it just in this way: "In the month of June, 1900, the parties hereto moved to the city of Minneapolis, this county and state, and began to live with the step-father of this plaintiff under an arrangement and agreement whereby the parties hereto were to be furnished a home and a living, without expense, upon condition that this plaintiff would manage the household for her step-

father, leaving this defendant"—meaning Dr. MacLean—"free to practice his profession as doctor and surgeon, which he agreed to do; that at once, upon commencing to live under said arrangement with this plaintiff's step-father, this defendant absented himself frequently and for long periods of time from this plaintiff and from said home." Do you remember that allegation in the complaint?

A. It sounds rather familiar; but as I say, I never read the whole thing.

Q. Do you remember that you and Peter B. Smith alone gave testimony in that case?

A. Mr. Mercer, as I told you, I don't remember distinctly what happened.

Mr. Mercer: I will ask to have that marked Defendant's Exhibit 1. I have an exemplified copy of the clerk's minutes here, if your Honor please, in that case, of January 8, 1902. I will state the substance of it. Court convenes, etc. Elizabeth Marian MacLean, plaintiff, sworn as a witness and testifies in her own behalf. Peter B. Smith, sworn as a witness, and testifies on behalf of the plaintiff. Cause submitted. Court adjourns. That is exemplified, and I will offer that also in evidence.

COURT: Was the testimony of the witnesses extended in the record?

Mr. Mercer: No. I have the decree that was entered—the judgment roll. I have shown by the clerk in a deposition that the transcript was not written out. There was no evidence taken in that case that was transcribed—none filed in the case. I will offer that as de-

fendant's Exhibit 1 in evidence. It includes not only the exemplification as to that case, and as to what took place on that case; but the exemplification that the argument took place on the demurrer which she put in here in the case of *Price v. Smith*.

Objected to as immaterial. Objection overruled.

Marked "Defendant's Exhibit 1."

Q. Now, do you remember that in the divorce case of yourself against your husband, after the testimony of yourself and Mr. Smith had been taken, that the court entered its findings, in which it included this, among other things: "That in June, 1900, the parties hereto began living in this city with and in the home of Peter B. Smith, and under the following arrangement and agreement made by and between said Peter B. Smith and this defendant, viz.: the parties hereto were to live for one year from said date with said Peter B. Smith and be supported by said Peter B. Smith without any expense whatever to this defendant, and this defendant was during said time to engage in the city in the practice of his profession of medicine and surgery, and to have as his own all of the money which he could make in the practice of his said profession during said times." Do you remember that that was the decision made by the court in that matter?

A. I don't know anything about that, Mr. Mercer.

Q. You don't know what was decided there?

A. No.

Q. But you knew you got your divorce?

A. I knew I got the divorce?

Q. Well, now, you don't remember testifying any-

thing in that case to the effect that the arrangement was for one year, yourself, do you?

A. I don't remember as to the arrangement for one year.

Q. You don't remember whether you testified anything about it?

A. Well, that arrangement says there, as between my Dad and Dr. MacLean. Perhaps I was not even told of it. My health was not very good then.

Q. I want to know what you did.

A. I don't remember.

Q. The arrangement under which you came back was made between Dr. MacLean and Mr. Smith, wasn't it?

A. I really don't know.

Mr. Mercer: I will offer that exemplified record in evidence.

Marked "Defendant's Exhibit 2."

COURT: What is the date of that entry?

Mr. Mercer: The date of the complaint is the 11th of September, 1901; the date of the findings of fact the 8th day of January, 1902; the date of the decree, the 9th of January, 1902.

Q. You were living there in the home of Peter B. Smith at the time this divorce action was granted?

A. Yes.

Q. You were at that time acting as the housekeeper for Mr. Smith?

A. Yes.

Q. Mr. Smith had in his employ a girl named Emily Carlson, did he not?

A. Yes.

Q. She had been in your mother's employ?

A. Yes.

Q. And was quite a competent house girl?

A. Yes.

Q. General house girl? She did the cooking and the housework generally.

A. Yes.

Q. She ordered quite a number of the meals?

A. Yes, we discussed the meals usually between us, what we would have.

Q. She frequently did the ordering and the planning of the meals, did she?

A. Very often we discussed what we would have, what we should have for our meals, and then either she would order them or I would order them.

Q. And generally speaking, she went right ahead after your mother's death just as she had before, didn't she?

A. Yes.

Q. And took a little more charge of things, didn't she?

A. Oh, yes.

Q. You had not been accustomed to keeping house in your mother's life-time?

A. No.

Q. You were not accustomed to planning meals?

A. No.

Q. Until you were married?

A. Why, no more than my mother would consult me what I would like, or something like that.

Q. Just asked you, as she would ask any other child what you would like?

A. Yes.

Q. Now, during the time that you and Dr. MacLean and Donald were living there, Mr. Smith furnished a nurse for Donald, didn't he?

A. Yes.

Q. He paid for that nurse?

A. Yes.

Q. And the nurse lived there in the house?

A. Certainly.

Q. After the second boy came there was a nurse furnished for both of them? I mean one nurse for the two?

A. Yes.

Q. And so long as you lived there in the house, there was always a nurse to look after the boys?

A. Yes.

Q. That nurse was paid by Mr. Smith?

A. I usually paid her.

Q. Well you got the money from him?

A. Certainly.

Q. After Mr. Smith married the defendant, she had charge generally of employing and discharging the nurses, didn't she?

A. Why, I don't know as she had charge of the nurses, employing and discharging the nurses, when I was there.

Q. Well, you changed nurses occasionally?

A. We changed nurses occasionally.

Q. Mrs. Smith hired them, didn't she, generally?

A. I think I was usually the one that spoke to the nurses about taking care of my children.

Q. You think you were usually the one?

A. I think so.

Q. You were not in the house but a little after Mrs. Smith came there, were you? I mean the defendant.

A. Yes. Just how do you mean that, Mr. Mercer?

Q. I mean you were not in Minneapolis.

A. Oh, no; I left Minneapolis.

Q. Mr. and Mrs. Smith were married in May, 1902?

A. Yes.

Q. How soon after that was it that you went to New York?

A. Why, I don't just remember. It was not very long.

Q. July or August, wasn't it?

A. I think around there some place.

Q. You came back from New York after how long?

A. I don't just remember how long that trip was.

Q. Some weeks, wasn't it?

A. Yes.

Q. And again in September you sought a position to go on the stage?

A. Yes.

Q. And you went on the stage in September and stayed until the following June?

A. The following—or last of May, I think it was.

Q. So that you got back to Mr. and Mrs. Smith's residence about the first of June, 1903?

A. About that.

Q. You said that Mr. and Mrs. Smith took a wedding trip, you thought, to the coast.

A. Yes.

Q. When they were married in 1902?

A. Yes.

Q. When they came back from the coast you stayed in the house until the time when you went to New York?

A. Yes.

Q. And when you came back from New York you stayed there until some time in September?

A. Yes.

Q. And when you came back from the stage in the summer of 1903 you stayed there in the house until the time when you went west with the children?

A. Yes.

Q. I suppose you were away visiting sometimes a little?

A. Why, it was a very short time after I went home that I took the children and came west.

Q. A very short time. How long were you there at that time?

A. Well, I don't remember exactly, but it was not very long. I only had time to pack up a few things and go on.

Q. Now, the boys had remained there with Mr. and Mrs. Smith from the time they were married until the time that you took them west, except perhaps for a short visit, something of that sort?

A. Yes.

Q. And they had had a nurse, as you understood it, during all of that time?

A. Yes.

Q. And Mrs. Smith was there looking after things generally?

A. Yes.

Q. During the time you were away?

A. Yes.

Q. Now, when Mr. and Mrs. Smith got back from their wedding trip in 1902, you had some friction with Mr. Smith, did you not?

A. In just what way, Mr. Mercer?

Q. Well, I ask if you had any at all?

A. When he got back from the wedding trip?

Q. Yes, or soon after that?

A. Why, yes, the trouble began a little after that time. I wouldn't say just then.

Q. Now, that first trouble was over the fact that Mr. Smith had made an allowance, out of which you were to pay the household bills, and you had used the money for other purposes and left the bills unpaid, wasn't it?

A. I never had an allowance.

Q. Didn't have any allowance at all?

A. Never was given an allowance.

Q. Did he give you an allowance of \$200 a month at any time there to run the house out of and pay your own wages?

A. Not that I remember of.

Q. You didn't have any money left with you when he went away?

A. Certainly I had money left with me.

Q. And didn't a controversy arise immediately upon his return or very soon after his return, between him and you, as to whether you hadn't used money that he had left to pay bills for other purposes?

A. There was a controversy about some—yes, about the money, about some of the bills hadn't been paid that he thought should have been paid.

Q. There was some controversy about your having charged bills to him that he didn't think should have been charged to him, wasn't there, at the stores?

A. Well, now, I don't just remember about that; but I had been in the habit of charging things.

Q. Do you remember some of the talk upon his part at that time with you, about advertising you in the papers so that the merchants wouldn't give credit to you on his account?

A. No.

Q. You don't remember that?

A. No.

Q. Do you remember a controversy reaching to a point where you didn't speak to each other, you and Mr. Smith?

A. I don't think there was anything so serious as that.

Q. You don't remember there being a time when you were living there in the house with him when you and Mr. Smith didn't speak as you passed by each other?

A. There might have been occasions of that sort when something came up.

Q. As a matter of fact, didn't you and Mr. Smith have a great deal of difficulty, practically continuous, out of money matters from the time he went on his wedding trip?

A. Well, the trouble began after he came back from his wedding trip.

Q. After that wedding trip, when he came home, the controversy that arose was over financial affairs, wasn't it?

A. That is when there began to be trouble over financial affairs.

Q. And from that time on, as long as you lived there in the house, you and Mr. Smith were on very strained terms, weren't you?

A. No, I shouldn't put it that way, Mr. Mercer.

Q. Well, how would you put it?

A. There was a strain in the house. There was a strain between the three of us. I doubt if there was any particular strain between my Dad and I.

Q. Now, isn't it true that, when Mr. and Mrs. Smith came back from their wedding trip, Mrs. Smith first discovered that you had made a wrong use of the money that he had left for you, and that she undertook to pay up the bills that you had created, out of the allowance that Mr. Smith had made her, so that Mr. Smith would not discover what you had done?

A. No. It was not as you have put that question, Mr. Mercer.

Q. Well, tell me how it was, then?

A. Why, I don't consider that there was any wrong use made of that money, and I had no allowance.

Q. Well, didn't Mrs. Smith take out of her allowance money to pay bills to keep Mr. Smith from knowing that you had created bills that had not been paid for a considerable time, when she first went into the home?

A. Not for a considerable time when she first came home.

Q. She did for a while, didn't she?

A. I think in some small matters, she did.

Q. And it finally came to the point where she couldn't protect you out of her allowance without Mr. Smith knowing it, didn't it?

A. Well, would you use the word "protect"?

Q. I have used it. If you prefer another word. What I mean is, it got to the point where Mrs. Smith could not any longer, out of the meager allowance she had, pay the bills which you thought ought not to be known to Mr. Smith, and that when that time came she told you that she couldn't attempt to do that any longer?

A. No, I don't know that—

Q. You don't know anything about that?

A. I don't know whether she had a meager allowance or not.

Q. But you do know that she took some of the money that you understood was from her allowance, and applied it on bills that you created personally?

A. No, I don't know just that.

Q. Well, what do you know about it, now? That is what I want to know.

A. I don't know that they were personal bills of mine.

Q. Well, they were bills you had created?

A. Yes, as running the house; as I had been spending money as I had always been used to spend money. That is what I expected was to be done. I know of no particular thing.

Q. Well, refreshing your recollection, did you ever know of a store in Minneapolis called Young-Quinlan's store?

A. Very well.

Q. Was one of these bills at Young-Quinlan's?

A. It may have been.

Q. And that was not for eatables, was it?

A. No.

Q. Now, as a matter of fact, I don't want to spend too much time on that, I want you to tell us now, if it is not true that when Mr. and Mrs. Smith came back from their wedding trip, there were a good many bills that had not been paid, when you had had money enough left with you to pay them?

A. Why, if I had had money enough left with me to pay them, they would have been paid.

Q. If you hadn't used the money for something else?

A. I don't think that I changed my habits in any way at that time, Mr. Mercer.

Q. Well, do you remember that you told Mrs. Smith that you didn't know what to do about the bills, that you had so many that you hadn't paid out of the money that Mr. Smith had left, and that you were afraid he would be cross with you if he found it out?

A. No, I don't remember just that.

Q. Do you remember in substance that?

A. Well, I remember that there was some talk about it, but I never had been afraid before to show my Dad any bills, but I know there was some little talk about the bills, and I don't remember now whether Mrs. Smith then said that she would pay them, or just how that was, Mr. Mercer.

Q. Well, don't you remember that Mrs. Smith did turn in for awhile and pay some of those bills?

A. I know that she paid some of the bills, yes.

Q. Now, do you remember that, when Mr. Smith found out that there were bills being created that had not been paid, there were some of them several months old?

A. No, I don't remember that.

Q. Do you remember any talk with him in which he told you that his credit had been hurt by that sort of thing, and that he could not allow you to go ahead doing that sort of charging accounts to him?

A. Well, I don't remember just that. I remember there was a good deal of talk about bills and about things after he was married to Mrs. Smith that there hadn't been before.

Q. You mean to imply by that, that when Mrs. Smith tried to help you out with that, she was to blame for it?

A. I don't mean to imply that.

Q. You had a friend by the name of Maud Marshall?

A. Yes.

Q. Maud Marshall was the wife subsequently of Henry Barnes, a lawyer?

A. Yes.

Q. Henry Barnes was a Harvard graduate?

A. I don't know.

Q. He practiced law a great many years in Minneapolis?

A. Yes.

Q. He died since your former suit was brought and before this one was brought?

A. I don't know.

Q. Didn't you know that?

A. No, I didn't know that.

Q. When you came on after the funeral, you went out to Minnetonka to visit at the Barnes home?

A. Yes.

Q. You and Mr. Price?

A. Yes.

Q. And you were on good terms with them?

A. Yes.

Q. And do you remember—there are one or two sentences here; I don't care anything about the whole letter—I would like to show them to Mr. Hallam, if you will allow me to do it. (Shows letter to Mr. Hallam.) Do you remember a time when Maud Marshall was in Europe?

A. Yes.

Q. What year was that?

A. I don't remember. I cannot remember exactly.

Q. Was it before Mr. Smith was married to the defendant or after?

A. Why, it was after.

Q. You are sure about that?

A. Well, I think it was after.

Q. You don't recollect?

A. I don't just remember.

Q. Had you any trouble about the bills before the time when he came back from his last wedding trip?

A. Why, nothing that I remember seriously.

Q. Is that your signature—"Bess"? I mean the word "Bess".

A. Yes.

Mr. Mercer: Now, I want to offer portions of this letter without putting the whole letter into the record, and counsel and I have agreed on that, as I understand.

Mr. Hallam: If the court please, I don't think the witness has fully identified the letter. She has identified the signature.

Mr. Mercer: She says that is her signature. I don't see how she can identify it any more.

COURT: There are two sheets there.

Q. That "Saturday Night" on the other sheet is yours, isn't it?

A. It looks very much like it.

Q. And the whole handwriting looks like yours, doesn't it?

A. Yes.

COURT: You have agreed that certain parts of it might be read?

Mr. Hallam: Yes.

COURT: You may read it, then, into the record, such part as you desire to go in.

Q. Was it during the summer that you were living there, after Mr. and Mrs. Smith (the defendant here)

were married, do you think, that Maud Marshall was in Europe?

A. Why, I think so.

Q. You think it was. You don't remember what months?

A. No.

Mr. Mercer: The first sentence that I wish to read is: "Heavens, Kid, how I do miss you. I am the only one of my class here now." The next is: "You heard the song at the Coon Club, didn't you, 'If money talks it ain't on speaking terms with me.' Well, that is the case with my wife, also with Dad. You see he got a few bills of mine while I was gone and we don't speak now as we pass by."

The Other sentence, which I want to change—I will see if we can agree on just how I shall put that—the gist of the other sentence, so far as I think it ought to go in the record, is that she states on Sunday, under the title "Sunday" that she is very unhappy, and sitting there crying then.

COURT: Very well.

Q. Now, from the time that you married Dr. MacLean, Mr. Smith furnished you no money, except an occasional Christmas present or something of that sort, while you were living with Dr. MacLean and before you came back to Minneapolis, or went there?

A. Before I went back to Minneapolis, yes.

Q. Dr. MacLean supported you during that time?

A. Yes.

Q. After you went back to Minneapolis, you had

no regular allowance for personal matters at all while you lived in the Smith home, did you?

A. No.

Q. After you went on the stage, after you decided to go on the stage, Mr. Smith allowed you a certain amount of money, did he not, while you were getting started on the stage?

A. Why, he allowed me a certain amount of money while I was on the stage, yes.

Q. And before you went on the stage and while you were running the house, didn't he allow you \$50 a week with which to pay the household bills and provide for yourself and the children?

A. There wasn't any regular allowance.

Q. Well, didn't he pay you usually \$50 a week, during the time that you were living there before he married the defendant, with the understanding that that should pay the household bills, and that you might have out of it what you had left?

A. No, that was not the way it was.

Q. Didn't he pay you \$50 per week?

A. Well, I don't know just how you mean. You mean give me \$50 a week separate by itself?

Q. Turn over to you \$50 a week.

A. I don't remember it that way, Mr. Mercer. He usually asked me every morning as he went out if I needed any money.

Q. Every morning?

A. As a usual thing; and he used to do that with my mother.

Q. Did he give you money every day?

A. Why, it was very, very frequent. He usually made that remark as he went out the door, "Well, Bess, do you need any money?"

Q. Every day in the week?

A. I said it was usually.

Q. Yes.

A. He usually did.

Q. You don't recollect of his paying you \$50 a week at the time while you were there acting as house-keeper, and paying it quite regularly?

A. I don't remember anything about the certain amount of \$50 a week to pay the bills and the rest for myself.

Q. Do you remember approximately how much it cost for the house bills while you were there at that time?

A. No, I don't.

Q. Did you keep any track of them?

A. No.

Q. Did you keep any track of what you, yourself, spent?

A. No, I never was required to make any accounting, and I never did.

Q. You didn't pretend to keep any set of books or anything of that sort, I suppose?

A. No, I was never asked to do it.

Q. Didn't keep any memoranda?

A. No.

Q. Did you have anything to do with checking up the bills to see how much the money was?

A. Why, when they came in, I think I simply

looked them over to see how much the total was, and told Dad.

Q. Were your grocery bills paid by check?

A. Why, usually I paid them with money.

Q. Usually paid them with money?

A. Yes.

Q. And not by check?

A. Not always.

Q. Well, then, Mr. Smith furnished you the money with which to pay the grocery bills, didn't he?

A. Yes, he furnished me the money for the bills and other things.

Q. Did you keep a bank account of your own?

A. No.

Q. But you had an understanding as to about how much you were to spend on the household, didn't you, with Mr. Smith?

A. No, I don't think I ever did.

Q. You don't think you ever did?

A. No.

Q. You don't think you ever had an understanding that he would turn over to you about \$50 a week, and that you would run the house out of that?

A. There was never any set amount in my recollection.

Q. Well, there was talk about his turning over to you and you running the house out of it, wasn't there?

A. Just when do you mean?

Q. After your mother's death, while you were living there, acting as housekeeper?

Jessie Carey Smith to break the news about pawn-tickets.

Q. Do you remember going with her to his office to talk about the matter?

A. Why, no, not about this particular time. I had gone to his office often with Jessie Carey Smith.

Q. Jessie Carey Smith is the lady who sits here in the court room?

A. Yes.

Q. She was the wife of Arthur Smith, the nephew of P. B. Smith?

A. Yes.

Q. And Arthur Smith at that time was engaged in business in one of the subsidiary companies under which Mr. Smith was the manager?

A. Yes.

Q. And Arthur Smith and Jessie Carey Smith were at the house of Peter B. Smith almost daily from the time your mother died until after Mr. Smith was married to the present defendant?

A. They were there very frequently.

Q. They were there frequently to dinner?

A. Yes.

Q. And it was a common occurrence, was it not, after you began to have trouble with Mr. Smith, for Jessie Carey Smith to be brought into the house to try to reconcile the two of you?

A. Just what do you mean, Mr. Mercer, by from the time that I began to have trouble with Mr. Smith?

Q. Well, any times when you had any trouble with him, did that happen?

A. I never had any trouble with him until after the marriage of Mr. Smith.

Q. That may be, but whenever you did have trouble with him.

A. Jessie Carey Smith was there frequently.

Q. Now, do you remember the occasion when there was talk about your going to Chicago to make your own living, when Mr. Smith thought that he would be willing to give you \$25.00 a month for a while to aid you, and Jessie Carey Smith was called over, and after considerable talk she suggested that he raise that amount?

A. I don't remember that.

Q. Did you finally go to Chicago?

A. No.

Q. Do you remember that while you were on the stage Mr. Smith paid you a certain amount per week?

A. Yes.

Q. How much?

A. \$15.00.

Q. \$15 per week. That kept up until you returned from the stage?

A. Yes.

Q. That arrangement was made when you went on the stage?

A. Yes.

Q. Now, during the time that he was paying you \$15 a week, he was paying the expenses of the children?

A. Yes.

Q. When the time came that you returned from the stage, you decided not to go on the stage any more, didn't you?

and we were trying to discover something by which I could earn a living.

Q. In other words, it was understood between you and Mr. Smith both at that time that it was necessary for you to get out and earn your own living, wasn't it?

A. Why, it was understood that I was very unhappy at home, and that I wanted to go and earn my own living if I could find some way to do it. First I went to my Dad and told him I couldn't stand it there at the house any longer that I was so miserable, and I asked him if I could not take the boys and go to a little apartment of my own, to take care of us. That was the first.

Q. Before you told him anything about that apartment, did you have some difficulty with him about your taking some things from the house and pawning them?

A. What things from the house?

Q. Anything?

A. Well, I don't quite understand that question.

Q. Well, did you have any difficulty with Mr. Smith before you finally left the house about pawning any diamonds or sealskins, or anything of that sort?

A. Why, I had pawned some of my own things, however.

Q. Some things that had belonged to your mother, also?

A. That were now mine.

Q. And Donald had pawned some things before he went away?

A. I understood so.

Q. Mr. Smith wished him to get him the pawn-tickets and let him redeem them, didn't he?

A. Why, I cannot be sure of that.

Q. Don't you remember that it cost him about \$300 to get that back?

A. No.

Q. You don't remember the amount?

A. I don't remember the amount.

Q. You did give him the pawn-tickets, and he did get them back, didn't he?

A. I think so.

Q. That matter came up subsequently to the time when the difficulty arose between you and him as to the bills, didn't it?

A. Well, now, I don't know, Mr. Mercer.

Q. At any rate, after the two happened, Mr. Smith told you, did he not, that he couldn't keep you in the house, in practical effect?

A. No, I don't remember that.

Q. Don't remember anything of that kind?

A. No.

Q. Did he tell you that he thought it was necessary for you to try to earn your own living on account of these things?

A. No, I think I suggested that first.

Q. Do you remember going with Jessie Carey Smith to his office in order to break the news gently to him about these pawn-tickets?

A. No.

Q. Have no recollection of any trip down there?

A. I don't remember of going to his office with

A. I don't remember any regular way at all. Every time I needed money he gave it to me.

Q. You don't remember of there being any understanding that you would pay the bills out of what he gave you?

A. Why, I know that I did pay some of the bills out of what he gave me. I didn't pay all the bills.

Q. But, generally, the household bills you paid out of the money he gave you, didn't you?

A. Generally I paid the household bills.

Q. And he gave you money for them as often as once a month, and generally oftener, didn't he?

A. It never was once a month, or anything like that, Mr. Mercer.

Q. It was oftener than that?

A. As a general rule, it was any time, I needed money. There was never any stated intervals of giving me money—never.

Q. How much would he give you at a time?

A. It would depend upon what he had or how much I asked him for.

Q. He brought home cash, did he?

A. He always seemed to have money right on his person.

Q. Now, when you commenced to talk about going on the stage, Mr. Smith thought, and expressed to you, that that would not be a good thing to do, especially if you went into the chorus, didn't he?

A. Mr. Smith didn't want me to go away at all.

Q. He didn't want you to go on the stage?

A. He didn't exactly approve of it, no.

Q. And when you decided to go on the stage, you had already considered going into other things, hadn't you, to earn your living?

A. Going into other things in what manner?

Q. Than going on the stage?

A. Well, there didn't seem to be anything else for me to do. The only thing I could do was dance.

Q. Do you remember a discussion with Mr. Smith about your going to Chicago to see if you could get a position there before the time when you went on the stage?

A. Position at what in Chicago?

Q. Well, of some sort, without having any definite idea in mind as to just what you would do?

A. I don't remember.

Q. Do you remember that you told Mr. Smith that you would go to Chicago and see if you could earn your own living, or help earn your own living, if he would aid you awhile until you got started?

A. Oh, I don't just remember. I was thinking—I was so unhappy, I was trying to find some scheme at the time. I don't just remember about that.

Q. Do you remember a time when Jessie Carey Smith came over to the house, and there was a discussion had between you and Mr. Smith as to whether or not you could earn your living if you went to Chicago, and that Jessie Carey urged him to give you more money than he was willing to give?

A. Why, I don't remember just that discussion, but I know that Jessie Carey Smith—we had talked it over,

Q. Now, after you decided to marry Price, you wrote Mr. Smith about it, didn't you?

A. Yes.

Q. And you asked him if he would feel like giving you anything if you married Price, didn't you?

A. I don't think I put it just like that.

Q. What did you say to him?

A. I don't remember.

Mr. Hallam: If the court please, the letter is here in evidence.

Mr. Mercer: The letter that she wrote to him?

Mr. Hallam: No. I misspoke myself—the letter from him. I misapprehended your question.

Q. Do you remember writing Mr. Smith that you were thinking of marrying Price?

A. I remember of writing Dad about it, yes.

Q. Do you remember asking him in the letter whether or not he would be willing to still continue paying you something per month until Price got started in his business?

A. No, I don't just remember that letter, Mr. Mercer.

Q. Do you remember telling Mr. Smith that Mr. Price at that time was working on a salary in his father's store?

A. Why, I presume I said it. It was so.

Q. That was the fact, wasn't it?

A. That was the fact.

Q. And how much salary was he getting?

A. I don't know.

Q. Didn't you ask Mr. Smith to continue contrib-

uting to your support in the event that you married Price, and didn't he refuse?

A. I don't think I did, Mr. Mercer.

Q. You don't think you asked him that?

A. I don't think at that time I asked him anything about it. I am not sure, but I doubt if I did that later.

Q. Does this refresh your memory: Isn't it a fact that from the time that you married Mr. Price Mr. Smith quit contributing anything to your support, but did send \$50 a month to be used by the boys until the time when he helped you build the house?

A. No. I don't just quite remember the last of that question. I was not quite clear.

Q. (Question read.)

A. Do you mean by that question that he never sent anything to us after he had helped us build the house?

COURT: Until the time you built the house.

Q. I am asking now until the time when he built the house.

A. That he had sent money for the children until the time, yes.

Q. \$50 a month?

A. Yes.

Q. And didn't he send \$100 a month at all after you were married to Price, did he?

A. No, not as an allowance; not \$100 as an allowance.

Q. And you understand that he was not contributing to your own allowance?

A. Yes.

Q. And at one time something was said about adopting you as the daughter of Mr. Smith, and you declined, because you thought your father might have a mine in Alaska, where he was, didn't you?

A. Oh, no, it was not that way.

Q. Did you ever tell Jessie Carey Smith that?

A. I don't think I ever told Jessie Carey Smith that.

Q. Or anything to that effect?

A. Not the way that is down.

Q. And did you tell her also that your mother didn't want you to be adopted by Mr. Smith because she thought that you might stand a chance to inherit from your father who was up in Alaska at that time hunting gold?

A. Why did you say "also?" I didn't assent to the other question.

Q. I don't mean to catch you on an also.

A. Well, I know, but I didn't understand the question. It wasn't clear, Mr. Mercer.

Q. All right, I want you to ask me if you don't. I don't want to mislead you in the slightest. Did you tell Jessie Carey Smith that Mr. Smith, at one time early after the marriage of your mother to him, had suggested that he might be willing to adopt you, and that your mother objected to it upon the ground that your father was up in the Klondike, and that he might have a mine up there, and they wanted you to inherit it if he did.

A. Well, that is a rather far-fetched tale, that a

young girl might do. It didn't seem necessary to adopt me legally.

Q. Now, answer the question, please.

A. I won't answer that question yes or no, Mr. Mercer. I say a girl might say something like that. A gold mine up in Alaska was rather a wonderful thing to a girl.

Q. You wouldn't want to say you didn't say it?

A. I wouldn't want to say I didn't say it, Mr. Mercer.

Q. That is what I want to get. Now, after you went down into Southern California, and before you married Price, Mr. Smith kept on sending you \$100 per month.

A. Yes. But would you call Mill Valley Southern California?

Q. Well, I don't know. Excuse me.

A. I would not.

Q. I thought you went first to southern California.

A. No, I went direct to Mill Valley.

Q. Where is Mill Valley?

A. Just across the bay from San Francisco.

Q. All right. California is a big state. I don't mean to catch you on that. But after you went down to Mill Valley to live, and until the time when you decided to marry Price, Mr. Smith furnished \$100 a month for you and the boys to live on down there?

A. Yes.

Q. And that was during the time that you now understand that your father was to have paid half of it.

A. As I understand it now.

A. I was home-sick and lonesome for the children, yes; and when I asked to take them and go by myself at that time Dad was willing to let me do it. It was just what I wanted to do when I first spoke to Dad, but I was not allowed to do it until after I had been on the stage for that one season.

Q. But then the time when you asked to take the children, you also asked to take the maid away from the house, and wanted Mr. Smith to set up a separate establishment and pay all the expenses of the maid and yourself and the children, and let you live alone, didn't you?

A. Yes.

Q. And he declined to do it?

A. Why, on the grounds that it would not look right, that I was his daughter, and as long as I stayed in Minneapolis I would have to stay at his house.

Q. You declined to do it?

A. Oh, yes, but for those reasons I have just said.

Q. Is that the only reason?

A. That was the reason he gave.

Q. Was that after you commenced to have difficulty with him?

A. Yes.

Q. Then when you came back from the stage, you understood that he wrote a letter to your uncle and aunt, or uncle or aunt, Mr. and Mrs. Wright, down in Ohio, to know if they could take you and the children, if he would pay them \$85 a month, did you not?

A. Well, I didn't know about it at the time.

Q. Didn't know about it at the time?

A. No.

Q. Did you know he made any effort to get them to take you?

A. I didn't know very much about it. I had heard rumors of such a thing.

Q. Then you understood that he got in communication with your father, and informed your father that something must be done about you and the children, did you not?

A. I knew nothing about that at the time, Mr. Mercer.

Q. Didn't you know that Mr. Smith arranged with your father that each of them would pay \$50 a month to support you and the children away?

A. Well, of course I know that now, but I didn't know it exactly at the time, and I don't see how it was possible to make such an arrangement.

Q. Well, you understand it was made, don't you?

A. Well, so I have since been informed.

Q. Now, you understand also that your father didn't pay his share of that arrangement, and that Mr. Smith paid the full \$100 a month.

A. As I say, I don't understand how the arrangement could be made because my own father never had that much to—

Q. Your own father at times was pretty well to do, wasn't he?

A. The times were not very often, and they didn't last long.

Q. Your own father had his ups and downs in finances?

A. Is that all? That he was not contributing?

COURT: You understood that he was not contributing at that time to your own allowance, but was contributing for the children.

A. Yes, he explained that in one of his letters.

Q. Do you remember this letter of July 22, 1905, that you have introduced in evidence from Mr. Smith to you?

A. You just want that paragraph?

Q. Yes. You remember it?

A. Yes.

Q. Was that when the matter came up as to what should be done in case you married Price?

A. Well, I think there is more than one letter on that subject there, isn't there, Mr. Mercer?

Q. Well, you can look at the letters all you please.

A. I thought you wanted me just to read the one paragraph.

Q. No, I wanted to know if that is when the matter of what should be done came up.

A. Yes.

Q. So that Mr. Smith raised the question when you announced you intended marriage as to whether he would continue to contribute to you, didn't he?

A. Well, now, I don't know.

Q. Well, this letter which I have just shown you is the first that was said about that element of it, isn't it?

A. Well, now, I cannot be sure. I haven't all the letters that I received from Dad. These are just a few that were in the bookcase and in the writing desk. Others were destroyed. Now, I don't say that those were

all the letters, not nearly all, that I got from him. I don't know as there was anything more after that.

Q. You got this money of \$100 for the wedding present?

A. Yes.

Q. And \$100 for the allowance of the last month, I mean the August month?

A. I presume so.

Q. Now, when you got that letter of July 22, 1905, you then wrote Mr. Smith a letter respecting the allowance, did you not?

A. I don't know. I presume I wrote him.

Q. And you received in the regular course of mail the letter which is dated December 14th, which has this clause: "I received your letter some time ago, and delayed answering because I have been very busy and not very well. I don't want to continue a monthly allowance, and don't think you should ask it." Do you remember that?

A. I remember the letter very well.

Q. Do you remember that Mr. Smith had his nephew Arthur investigate Price and see what he could find out about him out there?

A. No, I didn't know that.

Q. You didn't know about that?

A. No.

Q. But you proceeded to marry Mr. Price, and had the boys adopted as Price's children?

A. When you speak about Dad investigating Mr. Price, he speaks about him very well in that letter.

Q. Yes, I understood so.

A. I wondered if you meant anything outside of that letter. I knew what the letter said, yes.

COURT: You say the boys were adopted by Mr. Price?

A. Yes, Dad wished them—

COURT: Did they take the name of Price?

A. Yes, sir, they did. But they don't go by that name now.

Q. Well, the ultimate fact was, however it arose, that from the time you married Mr. Price, Mr. Smith quit making you any allowance for yourself?

A. Yes, any regular allowance.

Q. Well, now, all he did after that was an occasional Christmas present or something of that sort, besides what he did in the way of the home, wasn't it?

A. Why, yes, I presume so. Just what do you mean? There was never any regular allowance except for the boys.

Q. Well, that is what I am trying to get at.

A. Yes.

Q. He didn't pretend to contribute money to you individually right along after that, did he?

A. No.

Q. That is what I want. Now, there came a time in October, before he died in August, when he loaned \$2,000 to you and Mr. Price to aid in building a home, did there not?

A. I don't know just when it was, Mr. Mercer.

Q. You don't know just the amount?

A. I don't know just when it was. I think it was that amount.

Q. You think it was that amount?

A. Yes.

Q. Do you remember that he sent that to you in October and that after October he made no allowance for the boys?

A. I don't remember.

Q. Did you ever know of his making any allowance of any kind to the boys after he loaned that money to build the house?

A. I don't—no I don't remember.

Q. When he died, the note which he took for that house was not due, was it?

A. Well, I don't know anything about that.

Q. You don't know anything about it?

A. I don't know about it being due. It was all arranged for by Dad and Mr. Price. I don't know anything about that part of it.

Q. Well, after Mr. Smith died, that note was returned to you, wasn't it?

A. Yes.

Q. Because of a written request that Mr. Smith left with it?

A. I understand so.

Q. That note was returned to you and to Mr. Price personally at the time you came on to Minneapolis immediately following Mr. Smith's death?

A. Yes.

Q. And this letter marked Defendant's Exhibit 3-SKP, attached to the depositions here—Mr. Hallam, I can either offer this in evidence now or treat it as in. It will be offered later.

Mr. Hallam: There is no objection to that. It was in the pleadings. There is no question about it.

Q. This letter here under date of November 1, 1906, attached to the deposition, so far as it reads down to the point where it says, "Ned," is in the hand-writing of Mr. Price, isn't it?

COURT: What letter is that?

Mr. Mercer: It is a letter of Ned Price to Peter B. Smith. It is short. "Inclosed find my note," it the way it reads, "Inclosed find my note, if you will pardon the delay, the agreement is all ready, but as my father has gone to Los Gatos for a week or so, will have to wait his signature. Will forward it immediately upon his return. Yours very truly, Ned." That was in Ned's hand-writing?

A. Yes.

Q. Now, on the bottom of that, the part which reads as follows was in Peter B. Smith's hand-writing? "In the event of my death before the maturity of this note, it is my wish that it shall not be considered of any value, and returned to Mrs. E. J. Price as a bequest from me. P. B. Smith." That was in Mr. Smith's hand-writing?

A. Yes.

Q. Now, the note was signed by Edward J. Price, was it not?

A. Yes.

Q. After Mr. Smith died, after you came on to Minneapolis, and while you were there on September 13, 1907, you and Mr. Price received that note from General George P. Wilson, and gave the receipt which it attached to this deposition as Defendant's Exhibit

5, that which is attached as defendant's exhibit 6, did you not?

A. Shall I read these?

Q. Just look at them so you will know how to answer the question.

A. Yes, that is my signature.

Q. That is your signature?

A. Yes.

Q. And it was Mr. Price's signature?

A. Yes.

Q. And you got that note at the time those signatures were signed?

A. I don't believe I ever read that before, but that is my signature.

Q. The 13th of September was just before you left Minneapolis to go back to California, was it not?

A. Yes.

Q. Do you remember the date you left Minneapolis?

A. No.

Q. Do you remember that you went from Minneapolis to Chicago?

A. Yes.

Q. Do you remember that Mrs. Smith furnished the money for you to go home on from Minneapolis?

A. Well, I don't know just about that, Mr. Mercer.

Q. Don't you remember you asked her to give you the money, and that she gave it to you?

A. From Minneapolis?

Q. Yes.

A. I don't quite remember.

Q. Do you remember saying that you had a conversation with Mrs. Smith on the porch?

A. Yes.

Q. Do you remember saying to Mrs. Smith at that time that you were surprised that Dad didn't leave you anything?

A. Yes.

Q. Do you remember saying to her that you and Mr. Price were poor?

A. I don't remember saying that.

Q. Do you remember that the boys at that time were in California?

A. Yes.

Q. Do you remember that you said to Mrs. Smith at that time that you were sorry that Mr. Smith didn't leave you anything?

A. I don't know as I said just those words.

Q. I mean in substance.

A. I know I told her I was very much surprised that he hadn't.

Q. Do you remember the matter being mentioned then that this note had been left for you?

A. I don't remember mentioning it.

Q. Well, how did you find out that the note was left for you?

A. I don't just remember. I know that—I think it was down at General Wilson's office, wasn't it, that we received it?

Q. I think so.

A. I don't just remember how I was told of it.

Q. Well, you knew about it before you went to General Wilson's office, didn't you?

A. Why, I think I understood that that was the reason we were to go there.

Q. Now, where did you understand that?

A. I don't remember.

Q. Don't remember where you got that information?

A. No.

Q. Now, in the conversation you had on the porch, do you remember Mrs. Smith saying to you that she supposed what you meant was that the note was not money, and that you would prefer to have money than to have the note?

A. No.

Q. You don't remember anything about that?

A. No.

Q. And do you remember saying to her at that time that you didn't have the money to go back home on, and that you wanted to go home, and asked her if she would give you the money to go back to California, back home?

A. No, I don't recollect that.

Q. No recollection of any such conversation?

A. Perhaps I don't quite get your questions, but I don't understand that, Mr. Mercer. I don't remember any talk like that we had with Dewey on the porch.

Q. Don't remember that?

A. No.

COURT: Did Mrs. Smith give you money to go back home on?

A. I know she gave me some money to go back home on, yes.

COURT: You don't remember the conversation concerning the money to go back home on?

A. I don't remember just that, no.

Q. You didn't have but one conversation on the porch, did you, about what you were going to do in the future?

A. I don't just remember.

Q. Well, do you remember any more than one?

A. I know there was some talk about going back, but I don't just remember where it took place.

Q. You didn't mean to tell the court yesterday, in the answer you made to your own counsel's question, that Mrs. Smith suggested that you better go back, did you?

A. I meant exactly what I said yesterday. I think it was at her suggestion.

Q. Don't you remember that you said to Mrs. Smith that it was necessary for you to go back, but that you didn't have the money, and that you asked her if she would give you the money to go home on?

A. Well, I can't be quite sure of that.

Q. Don't you remember—to refresh your memory—that Ned, as you all called him, went with Mrs. Smith down town so that she could get the money from the bank, and that the tickets were gotten or supposed to be gotten then?

A. Why, I understand that, but I understood that it was Ned and Mrs. Smith that made the arrangement, not me.

Q. Do you remember that you first got the money from Mrs. Smith to go home on in the sum of \$100, that you went out to the Barnes to visit, and spent that money, and came back and asked her again for money to take you home?

A. No, I don't.

Q. Don't you remember that she gave you \$100 the first time you brought it up, and that you went out to the Barnes and came back, and she then gave you further money?

A. I don't see where the money could have gone out to the Barnes.

COURT: Well, do you remember that?

A. No, I don't remember that.

Q. Well, do you remember that instead of going to California you and Mr. Price went to Chicago when you got the money?

A. I know we went to Chicago on the way to California.

Q. And after you had been in Chicago a few days, do you remember calling for more money?

A. Yes, I remember that we needed money in Chicago.

Q. Did you have Mr. Price write Mrs. Smith for money?

A. I didn't have him do it.

Q. You understood he did do it?

A. I don't know. I think so. I was ill.

Q. Did you see the wire that came back from Mrs. Smith?

A. I don't know whether I saw it or not.

Q. But at any rate you know that the transaction of whether Mrs. Smith would put up more money was then going on between Mr. Price and Mrs. Smith?

A. Well, I say I don't know much about that. I wasn't well, Mr. Mercer, and I don't know. I had nothing to do with that.

Q. Now, do you remember that after you got to Chicago, after this correspondence, telegrams, etc., had been going on, that Jessie Carey Smith came down for Mrs. Smith, to see what the trouble was?

A. Yes, I knew she came down.

Q. And that she then let you have further money?

A. Yes.

Q. And that you and Mr. Price gave your note for that money?

A. Well, I don't know about that.

Q. You don't recollect about that?

A. I don't know about that part of it.

Mr. Mercer: I will ask to have these marked.

Marked "Defendant's Exhibits 2 and 3."

Q. I will show you Defendant's Exhibit 3 and ask you if that is in Ned's handwriting.

A. Do you wish me to read it all?

Q. Just enough to tell us whether it is in his handwriting. Look at his signature.

A. Yes, it looks like his writing.

Q. And Defendant's Exhibit 4, and ask you if that is the wire that came in answer to it.

A. Well, I don't know anything about the answer. I don't know whether that is the answer that came from it or not.

Q. You don't know whether that is the answer or not?

A. No.

Q. Did you know that this was the letter that was sent?

A. No, I didn't see the letter that was sent.

Q. You knew there was correspondence going on about it?

A. I knew there was correspondence, yes.

Q. The correspondence went on with your approval, didn't it?

A. As I say, Mr. Mercer, I didn't know very much about it. Some things I didn't know about at all that was done there.

Q. But you knew in a general way that an effort was being made to get Mrs. Smith to put up more money?

A. I don't put it that way. I knew in a general way that there would have to be some money to get back to California on, as I understood from Mr. Price, though I knew nothing of it at the time.

Mr. Mercer: I think I will offer this.

Q. Didn't you know that this correspondence was going on?

A. Yes, but I didn't know the details. I knew nothing about the details of the correspondence.

Q. You knew when Jessie Carey Smith was there.

A. I knew when she was there, certainly.

Q. You knew as soon as you got well enough to go that you and your husband went to California, and Jessie Carey Smith put up the money for it?

A. Yes.

Q. You understood that was on account of Mrs. Smith, didn't you?

A. Yes.

Q. Showing you Defendant's Exhibit 5, I will ask you if that is the note which you and Mr. Price gave in the name of Jessie Carey Smith for the money which you received.

A. It looks like it. I don't know.

Q. And showing you Exhibit 6, I will ask you if that is not the receipt signed by both of you for the \$114?

A. What is that then? Isn't that the same?

Q. That is the note for the same amount of money.

COURT: How much is the note?

Mr. Mercer: \$114.

A. I guess they are all right. I don't know anything about that sort of thing.

Mr. Mercer: Now, I will offer Defendant's Exhibit 3, which is the letter from Mrs. Price to Mrs. Smith, asking for money; Defendant's Exhibit 4, which is wire from Mrs. Smith back to Mrs. Price—

COURT: You don't object to the telegram?

Mr. Hallam: I would like to look them over first.

Mr. Mercer: If there is objection to the telegram, it is perhaps not sufficiently identified. And defendant's Exhibits 5 and 6, the one being the note and the other the receipt.

Mr. Hallam: This telegram purports to be an answer to this letter.

Mr. Mercer: Yes, that is what I take it to be.

Mr. Hallam: I didn't distinctly understand whether Mrs. Price identified this as Ned's signature.

Mr. Mercer: She identified the letter.

A. I identified the signature. I presume it is all right. I don't know anything about such matters, as I told you.

Mr. Hallam: You think it is his writing?

A. Oh, yes.

Mr. Hallam: I doubt if the telegram is adequately identified, but it appears to be in answer to the letter and I will make no objection whatever.

COURT: Very well. Let it be admitted.

Received as Exhibits 3, 4, 5 and 6, and read in evidence.

Q. The note was dated October 5, the note and the receipt. I suppose these are Jessie Carey Smith's handwriting, aren't they? I mean the body.

A. Yes, the body.

Q. Now, upon receipt of that money you and Mr. Price took the train for California?

A. Yes.

Q. From that time on until you started your suit in this case in Minnesota, you didn't write to Mrs. Smith at all, did you?

A. Yes, I wrote her when I got back to Mill Valley.

Q. Did you write her to thank her for this money?

A. I don't remember just how that was. I think Mr. Price wrote her also.

Q. Do you know when you wrote her?

A. I cannot give you the dates, no.

Q. Well, the only thing that you said about money or property to her from that time on was what was said in these legal papers that were served in the two cases, wasn't it?

A. No. I wrote her from Mill Valley.

Q. What did you write her from Mill Valley?

A. When I heard nothing from her about the estate having been settled I wrote her about that, but received no answer.

Q. You mean you wrote to Mrs. Smith—

A. Yes.

Q. And said you thought the estate ought to be settled or something of that sort?

A. Asked if it had been. I don't remember just the wording of the letters. Mr. Price wrote them with me—helped me to write them.

Q. I want you to tell us as nearly as you can what you did say, if you claim you wrote any letter of that sort.

A. Why, the time went on, and we didn't hear anything at all from Mrs. Smith, and—

COURT: Have you that letter?

Mr. Mercer: No, we never got any such letter. That is beyond our showing.

A. Mr. Price told me how to word it in a way. We asked if the estate had been probated, and that we were surprised not to have heard from her.

Q. Where were you when you wrote that letter?

A. At my own home.

Q. Who was present?

A. Why, Mr. Price.

Q. When was that letter written?

A. I don't know. It was not very long after we had returned. In time, at least, it was long enough so that we began to think we should have heard from her.

Q. You went back to Minneapolis before you started the first suit, didn't you?

A. Oh, yes.

Q. You didn't let Mrs. Smith know you were in town?

A. No, by advice of counsel.

Q. You didn't telephone her?

A. No.

Q. When did this advice of counsel begin? Was it after you got back to Minnesota?

A. About communicating with Mrs. Smith?

Q. Yes.

A. Yes.

Q. Did you take advice of counsel when you were in Minnesota the first time?

A. I didn't retain any counsel. I don't know just how I should answer that. I talked things over in an informal way.

Q. With counsel when you were there immediately after Mr. Smith's death?

A. Well, it was not at all in a business way, Mr. Mercer.

Q. Well, who was the counsel?

A. We talked it over in a friendly way with Mr. Barnes—very little.

Q. And Mr. Barnes was engaged then in practice of law there?

A. I think so.

Q. You had gone from Mrs. Smith's home out to the Barnes home to visit?

A. Yes.

Q. And you were out there for a number of days?

A. Several days.

Q. You knew at that time that the will which Mr. Smith left at the time of his death did not make any provision for you?

A. Well, I don't know if I knew that before I went out or afterwards.

Q. You saw the will, was the first information you had on that?

A. Why, I think so.

Q. You are not sure whether you saw it before you went out to Mrs. Barnes' or after you went out?

A. No, I don't remember that.

Q. What is your best recollection about it?

A. I don't remember just how it came about, but anyhow we wanted to see just what the will was, and I had tried to talk about it with Mrs. Smith, but I had never had any occasion—I mean proper occasion—never found one. So I think that Mr. Price suggested that we could see her; that any one could see her.

Q. You don't mean to say that you asked Mrs. Smith to talk to you about anything that she declined to discuss with you, do you?

A. No, I don't say that; but I never found an opportunity to discuss it with her—proper opportunity.

Q. Do you remember of Mrs. Bates, who sits here

in the room, being a guest in the house while you were there?

A. I think she was there. I don't remember that she was there all the time. I don't remember.

Recess until 2 p. m.

Cross Examination continued.

Q. Have you any other correspondence except what you have produced here? I mean correspondence with P. B. Smith.

A. No, that is all I can find at this time.

Q. Have you any correspondence with Mrs. Smith?

A. No, I haven't any correspondence with Mrs. Smith.

Q. Did you see Mr. Smith personally after the 14th of December, 1906?

A. You ask if I saw him?

Q. Yes.

A. Let's see—1906. Why, no, I don't think so.

Q. You have never had a talk with him then of course after 1906?

A. Well, that was the trip just after they had come back from Japan, yes.

Q. Well, I had in mind the end of the year after he wrote you on the December 14th.

A. Well, I never saw him again after he was there after the earthquake.

Q. You never saw him again after he stopped in California on his way back from Japan?

A. No.

Q. Is that right?

A. Yes.

Q. At the time he stopped there on his way back from Japan, Mrs. Smith, the defendant, was with him?

A. Yes, sir.

Q. And Mr. Smith at that time was not very well?

A. Why, he was not ill.

Q. Did you know whether or not he went on the trip to Japan for his health?

A. No, I didn't understand that he had.

Q. You understood that he finally died suddenly up in the New England states?

A. Yes.

Q. How old a man was Mr. Smith when he married your mother, if you know?

A. Well, I will have to figure that out. I am not really good at figures. Why, I think he must have been about 42, as near as I can figure that out.

Q. In 1893?

A. Why, I imagine he must have been somewhere around there.

Q. In stature he was rather a large man?

A. Yes.

Q. And medium fleshy?

A. Yes.

Q. A man of few words in his ordinary conversation, wasn't he?

A. Few words?

Q. Few words.

A. Why, rather; still he was not—

Q. He was not a clam?

A. No.

Q. But in the course of conversation generally, he

was the sort of man who kept still, let other people talk, and then if it was necessary expressed himself briefly, didn't he?

A. Yes, at times.

Q. He was not a man of an excitable disposition?

A. No.

Q. But went about usually in a calm manner, about his own business, and said little to people in general?

A. Yes, in general.

Q. Mr. Smith has as strict regard for keeping his word as any person you ever saw, didn't he?

A. Yes.

Q. And whenever he told a person anything, so far as you knew, he attempted to carry out exactly what he told them he would do, didn't he?

A. Yes.

Q. He was in no sense what you would call a vacillating man, was he?

A. Well, there were times when I thought he showed—not when I first knew him, but later he showed—well, no, I wouldn't say that.

COURT: He hadn't begun to fail, had he, when he died?

A. Oh, no.

COURT: At the time of his death?

A. Not that I knew of.

COURT: Either mentally or physically?

A. No.

Q. When you saw him last, he was in apparent possession of all of his faculties, and looked well, didn't he?

A. Yes.

Q. Now, when you were in Minneapolis in 1907, did you talk with other lawyers besides Mr. Barnes about Mr. Smith's will?

A. In 1907? That was just after his death.

Q. Yes.

A. No, I think not.

Q. Did you take the matter of the will up with Mr. Higgins while you were there on that trip?

A. Well, now, I am understanding that this is the trip that Mr. Price and I went on just after Dad's death.

Q. Yes.

A. No, I didn't know Mr. Higgins then.

Q. When did you first meet Mr. Higgins?

A. I met Mr. Higgins almost immediately after my return to Minneapolis with the children.

Q. After your return to Minneapolis with the children?

A. Yes.

Q. That was the next year, 1908?

A. That was the next year.

Q. Did you meet him through Mr. Barnes?

A. No.

Q. Now, did you know Mr. Spalding, who was in the office with Mr. Hutchinson?

A. No, I don't remember him. I may have met him, but I don't remember him.

Q. You met Mr. Hutchinson?

A. I met Mr. Hutchinson.

Q. When did you first meet Mr. Hutchinson?

A. Well, I don't just remember. I know Mr.

Higgins sent for him to come to his office. I met him at Mr. Higgins' office.

Q. You didn't know Mr. Hutchinson before that?

A. I didn't know him before that.

Q. It was after your return to Minneapolis?

A. It was after my return.

Q. You had had no correspondence with anybody relative to this matter besides the letter you say you wrote to Mrs. Smith before you returned?

A. There had been a few letters between Mr. Barnes and myself.

Q. Between Mr. Barnes and yourself?

A. Yes.

Q. Mr. Barnes, as you understood, had a law office in Minneapolis?

A. Yes.

Q. And was engaged in practice there?

A. Yes.

Q. And he had been a friend of yours for how long?

A. I had never met Mr. Barnes until the year before when Mr. Price and I went back to Minneapolis after my Dad's death.

Q. You had known his wife, but not him?

A. I had known his wife but not him.

Mr. Mercer: Now, Mr. Hallam, before I overlook it, I suppose it may be conceded that the judgment roll attached to the answer is admitted in evidence, may it? If not, I will formally offer it.

Mr. Hallam: I don't think it is necessary to offer it. It is a part of the pleadings. Do you wish to offer it in evidence?

Mr. Mercer: It is part of the pleadings, but there is no pleading here to admit it formally, and I want to be sure there couldn't be any possible question.

Mr. Hallam: It was admitted that it is a correct copy of the proceeding. If you will offer it in evidence formally, I think I should object to it as incompetent, irrelevant and immaterial.

Mr. Mercer: Well, it is a correct copy, and I ask to offer it and allow it to be treated in evidence, although it is included in the answer, because there is no formal reply in the case.

COURT: You have no objection to that except that it is immaterial?

Mr. Hallam: Yes.

COURT: Let that be understood, that it is offered in evidence and received in evidence and is part of the evidence in this case, and that you object to it only upon the ground that it is immaterial to the issues in this case, and the court will overrule your objection, and you may have an exception.

Mr. Mercer: Now I wish to offer an exemplified copy of the following records from the probate court of Hennepin County, Minnesota. It includes petition to probate the will of Peter B. Smith, with the testimony of the subscribing witnesses, a copy of the will itself, the order admitting it to probate and for a bond and for letters, an affidavit of the executrix for letters testamentary, etc.

Mr. Hallam: I think there is no objection. It is the probate proceedings.

Q. I believe you said that Mr. Smith talked to you

on a number of occasions about the matter of your getting a divorce from your husband.

A. Yes.

Q. And that you never told him that you would get that divorce until some time in the spring or summer before you filed the action.

A. I think that is correct, before I finally agreed to it.

Q. Now, where were you when you say you agreed to that?

Mr. Hallam: If the court please, I object to this on the ground that it was fully covered in counsel's cross examination yesterday.

Mr. Mercer: Oh, no.

COURT: I will hear it.

A. Do you mean my absolute position?

Q. No. I want to know what part of the house you were in or whether you were in the house?

A. Well, that is rather hard to say. I hardly remember exactly just where I was.

Q. Was it at the table?

A. Well, now, I cannot be sure, but it seems to me that it was in the dining room, but I won't say positively. I don't remember.

Q. Were you alone with Mr. Smith at that time?

A. Well, I don't know if we were alone. All along this time when I was so miserable, and hardly knew what to do, Mrs. Jessie Carey Smith was with me almost—well, a great deal—almost continuously. I would turn to her, and relied on her advice, and was with her almost all the time.

Q. That is, with Jessie Carey Smith?

A. I mean Jessie Carey Smith.

Q. Well, now, since you have mentioned that matter, it is a fact, isn't it, that during that first nine months after Donald went away, Jessie Carey Smith spent a good deal of the time with you during day times and sometimes evenings?

A. She spent a good deal of time with me.

Q. You don't remember whether the conversation was at a time when she was present?

A. No, I don't.

Q. What is your best recollection?

A. Well, I don't remember. I wouldn't have thought anything about it if she had been there, because she was there so frequently. I don't know whether she was there then or not, Mr. Mercer. I don't remember.

Q. You don't remember whether there was anybody else there at that time?

A. No, I don't remember.

Q. Now, do you remember what Mr. Smith said at that time?

A. I don't—I wouldn't swear to that, because you know my mind was very much disturbed. I know that he was very much pleased. I cannot say what he said, but he was very much pleased and very gratified that at last I had consented.

COURT: Did you confide in Jessie Carey Smith in these matters?

A. I was with Jessie Carey Smith then a great part of the time, relied upon her, and depended on her to a great extent.

COURT: Well, did you confide in her as to what your arrangements were with Mr. Smith?

A. I don't know as I ever mentioned that to her, but I confided in her a great deal about the Doctor, and about the divorce—what I thought about that. I don't know as I confided in her exactly about the other arrangement. It was mostly about the Doctor I went to her.

Q. What I want to know is if you can tell me who was present at the time when you say that Mr. Smith told you that he would leave you all of his property.

A. Well, he told me that several times.

Q. You stated yesterday, if I understand the testimony correctly, that he did state that on a number of occasions, but that you made no agreement to it until one particular time when you said you told him that you would get a divorce. Am I right about that?

A. Well, I don't know just as I quoted those words. I know that I did not agree finally to get a divorce until this time when I said, "All right, go ahead."

Q. You did not understand, up to the time when you said you would go ahead with the divorce, that you had agreed to do what Mr. Smith had proposed, did you?

A. Well, isn't getting the divorce and agreeing to what he proposed the same thing?

Q. I am trying to find out now what you know about it, Mrs. Price. I should like to know exactly what happened, what was said, who was present, and all about the time when you claim that you told Mr. Smith that

you would get the divorce and accept the other proposition.

A. Well, as I said before, I don't remember all the details, I don't know who was there. I know that it was an effort, a great trial to me to make up my mind. It meant a good deal to me. I had fought hard against the necessity of it. And when I finally did decide to divorce the doctor, I don't know who was there.

Q. Now, the matter of divorcing the doctor was the matter that you and Mr. Smith had talked about at various times, wasn't it?

A. Various times.

Q. And that came about in the inception because the doctor was not able to support you at that time, didn't it?

A. As a general thing.

Q. You stated yesterday that Mr. Smith took the baby out of your arms, and wouldn't let you take the baby, when the doctor went away. Isn't it true that Mr. Smith had to furnish the doctor money to get away on?

A. Why, certainly; yes.

Q. You didn't have any money to get away with, did you?

A. No.

Q. And the doctor didn't have any money to take you with him, did he?

A. No.

Q. And Mr. Smith advised you that until the doctor could earn something to support you, that you had better stay there and live with him, didn't he?

A. No, he didn't put it that way. He forbade me to go, Mr. Mercer.

Q. Well, how could you go without money?

A. Well, I don't know. I don't know about that. But I was not allowed even to consider going with him, with the doctor.

Q. And as a matter of fact, Mr. Smith told you then, didn't he, that if the doctor got himself established some place you could go to him?

A. Why, yes, he told me that, I presume in a way to quiet me.

Q. And he told you that a good many times, didn't he, afterwards?

A. Yes; but he said also that he never expected that he would.

Q. Yes. But that if he did, you could go.

A. Yes.

Q. And he kept that up as long as you didn't apply for the divorce, didn't he?

A. Oh, no. He insisted upon my getting a divorce, and he every day, almost continuously, was grinding that—that I must divorce the doctor.

Q. Now, I don't want to get the record too full, and I don't want to scold, but I wish you wouldn't talk on things that I don't ask you about.

A. I beg your pardon.

Q. I will put the question so you won't have any misunderstanding about it. As long as you didn't apply for the divorce, Mr. Smith always told you, when the matter was brought up, that the only reason why he ob-

jected to your going to the doctor was, that the doctor had no way to support you?

A. No.

Q. Didn't you understand that that was Mr. Smith's attitude?

A. That was Mr. Smith's attitude at the beginning of the divorce, he did that. Well, I won't say anything more. At the beginning, when the doctor first went away, he made that remark.

Q. Now, after the doctor went away, you used to send him money, didn't you?

A. Yes, occasionally.

Q. Some of the money that Mr. Smith furnished you?

A. Some.

Q. And finally did you have any trouble with Mr. Smith about that?

A. I think there was a little trouble about that.

Q. And that trouble was before Mr. Smith was married to the present defendant?

A. Yes.

Q. And Mr. Smith objected to furnishing money to you which you used to send to the doctor, didn't he?

A. Well, I didn't send a great deal of money to the doctor—it was not a regular thing—of Dad's money. I had some money at times of my own that I sent him.

Q. Before your divorce?

A. Yes.

Q. Were you earning money then?

A. No.

Q. Did you have an inheritance from your mother or some one?

A. No.

Q. What do you mean by having some money of your own that you sent?

A. Well, money that I had won in other ways.

Q. You did send money at times that Mr. Smith would give you to the doctor, did you not, while he was away, after going?

A. Yes, occassionally.

Q. And Mr. Smith understood that, and that kept up until the time when you decided to get a divorce?

A. Well, it wasn't continuously. It was only seldom.

Q. Occasionally?

A. Occasionally, yes.

Q. But the doctor was not sending you any money during that period?

A. No.

Q. Neither for the support of yourself nor your children?

A. No.

Q. And so far as you could find out, was not giving any indication that he would be able to do so soon?

A. No practical indication.

Q. Now, you never told Mr. Smith at any time until you decided to get a divorce that you would accept any suggestion that he had made, did you, about this matter?

A. That is rather queerly worded. I don't understand that.

Question read.

A. I don't think so; speaking always of the idea that I would divorce the doctor.

COURT: Do you remember when you decided to get the divorce?

A. Why, it was early in the spring.

COURT: Of 1901?

A. Of 1901.

Q. Well, do you remember the conversation that took place when you told Mr. Smith that you had decided to get the divorce? Now, I want exactly the language, if you can give it.

A. I told you I couldn't, Mr. Mercer.

Q. Then I want the substance of it, as to what you said and what he said, if you please.

A. Well, the substance of it, and the most important part to my mind, is my saying—I just gave up, and said, "All right, Dad; go ahead and get the divorce."

Q. That is all you said?

A. I don't say that if all I said. I said that was the important thing.

Q. Don't you remember anything else you said at that time?

A. I was pretty well worked up. I don't remember exactly anything else.

Q. At the time when that conversation took place, and you told him that you had decided to get the divorce, Mr. Smith didn't say anything about a will, did he?

A. I don't remember.

Q. He didn't say anything about property at all, did he?

A. Why, I don't remember that he did, Mr. Mercer, just at that time.

Q. And you didn't say anything about it?

A. Why, I considered that that was it, when I agreed to what he asked.

Mr. Mercer: I will ask to strike that out as not responsive to the question.

COURT: You considered that a continuing proposition, and that you didn't accept until you had concluded to get the divorce?

A. That was when I decided to get the divorce, I considered that that was the—

COURT: The culmination of the contract?

A. The end of it.

Q. Well, now, there was nothing said at that time about a will or property, or anything of that kind?

A. I told you I didn't remember. It was hard for me to make up my mind; I was giving up a good deal; and when I decided to divorce the doctor, that was the only thing then I could think of. I don't remember the details that happened at that time.

Q. Up to that time Mr. Smith had never mentioned the word "Will" to you, had he?

A. Well, the word "Will"—

Q. That is what I am asking—I am asking now.

A. Well, he may have mentioned the word "Will."

Q. Not in relation to his affairs and yours, did he, the word "Will"?

A. I don't think he ever—I don't know, but I don't recollect the word "will" exactly.

Q. Now, you hadn't mentioned the matter of his will to him, had you, in the terms of will?

A. I don't think so.

Q. As a matter of fact, you never had discussed with Mr. Smith the question of how he would leave his property, had you, in so many words?

A. Only what he had said, that he would leave it all to me.

Q. Did he say when he would leave it to you?

A. When he was gone.

Q. Did he say he would leave it by will?

A. He didn't say "will" that I remember.

Q. Showing this letter, which is dated the 14th of may, 1902, signed by Peter B. Smith and attached to the depositions, I understand that is the one that you had in mind yesterday when you were answering counsel that you didn't know about that letter until in April this year?

A. Yes.

Q. Now, you didn't know what will Mr. Smith had left at all until you went back to the court house there, when you were in Minneapolis after his death, and examined the one that was on file, did you?

A. Didn't know about any will?

Q. Didn't know what will he had left?

A. No.

Q. And you didn't know at the time he died whether he had made any will at all or not?

A. No.

Q. As a matter of fact, the question of his making a will where the term "will" was used, was never mentioned between you and Mr. Smith at any time, was it?

A. Well, it seems to me that on one occasion—I don't know as this is material here—you say using the the word "will"—it was not a word that was used frequently; but it seems to me that at one time when Dad was making the remark, insisting that I consent to divorce the doctor, that he made the remark—I cannot swear just how this was—that he made a remark that he wished I would make up my mind so that he could—I don't know whether he used the word "will" or not—I cannot answer that.

Q. Now, he never said anything to you after he was married about any will?

Q. After he was married to the defendant?

A. About a will?

A. No.

Q. Never said anything to you after he was married to the defendant about leaving you any property?

A. No, I don't think the question ever came up.

Q. And Mrs. Smith never discussed property matters with you after she was married, did she?

A. No, I think not.

Q. And she didn't discuss them with you before she was married, did she?

A. Only that night, as I told you, when she came back and told me that she was to marry my Dad.

Q. Yes, but what you said then had nothing to do with property, the way you told it. Did she say anything to you about property that night?

A. Well, I consider that the property comes in when she said she would never interfere between myself and my dad, between my Dad and myself and the boys.

Q. You mean to say that she said the word "property" that night in any sense?

A. I don't say that she said property.

Q. Or will, or anything about a will?

A. She didn't say property or will, but I understood it to mean that.

Q. Had you said anything to her so that you could have any reason for understanding that?

A. Had I said anything to her in what way?

Q. With respect to property?

A. I think not.

Q. Did you tell her that in any way, that you claimed to have any interest in Mr. Smith's estate?

A. Why, I don't think it ever came up like that.

Q. Anything of that kind, any other words that could possibly be understood as that?

A. Why, up to that time I don't think I had ever made any remark at all of that sort to her about the property.

Q. As a matter of fact, up to that time, you never had paid much attention to your expenditures, nor where your living was coming from, had you?

A. Simply I knew that my Dad was supporting us, as he said he would do.

Q. That is all you knew about it, wasn't it?

A. Just about.

Q. All you understood that your Dad said he would

support you because of the fact that he thought you had no other place to go, didn't you?

A. Why, no, I didn't understand it that way.

Q. Did you keep any copy of the letter which you say you wrote to Mrs. Smith after you went back to California?

A. No, I didn't.

Q. You got no acknowledgment of any letter back from Mrs. Smith after that?

A. I heard nothing from her.

Q. What did you say in that letter?

A. Why, it was Mr. Price helped me to write it. It was simply that I hadn't heard anything from her about the estate having been probated, and it was just an inquiry about it.

Q. Did you say to her that you thought you were entitled to two-thirds of the estate?

A. I don't think—I cannot be sure that I said that to her. I think I made some remark that I thought it was time that we were getting our share, or something like that. I don't know as I stipulated the amount.

Q. Well, do you know that you used the word "share"?

A. I think I probably did. I thought of it that way. I couldn't swear to that, though.

Q. You and Mr. Price figured out together what you would like to say to Mrs. Smith?

A. Did we figure out together?

Q. Talked over together what you would like to say to Mrs. Smith?

A. Why, yes, in a way.

Q. Who wrote the letter?

A. I wrote it.

Q. Was Mr. Price with you when you wrote it?

A. I don't know whether he was right there then or not.

Q. Did he see it before it went out?

A. Yes.

Q. You read it over together?

A. Yes.

Q. Did you discuss it before the time when you wrote it—discuss the matter of writing a letter?

A. As I think one naturally would do.

Q. Just because you think you naturally would is all you remember about it, is it?

A. Oh, no, we discussed it, naturally.

Q. Did you discuss what the value of the estate was?

A. We spoke of the estate and the value of it.

Q. Did you get any records from the Probate Court in Minneapolis?

A. You mean when we were there?

Q. Either then or thereafter before the time when you say you wrote?

A. Why, I don't think so.

Q. How did you know the value?

A. Well, it was in the papers about the value; and I don't say that I knew the exact value, because I didn't.

Q. Well, now, did you write that letter before the estate was closed out, that is, within a short time after you went back home, or when was it?

A. It was quite a little time after we got home, and

we began to think it was queer we didn't hear something about it. I don't know just how long.

Q. What did you expect to hear?

A. That we would be notified as to our share of Dad's estate.

Q. Whom did you expect to notify you?

A. I expected Mrs. Smith to notify us.

Q. Did you say anything to Mrs. Smith about the matter at the time you took this note?

A. Took this note?

Q. That I showed you this morning, for which you gave the receipt, the \$2000 note?

A. Why, no, I don't think anything was said then.

Q. Didn't say anything to General Wilson at that time about claiming any interest in the estate?

A. I don't think so. We didn't go to any outsiders at all that I remember.

Q. How soon was it after you wrote that letter that you started on to Minneapolis to bring your suit?

A. Oh, it was quite awhile. In the meantime I had known that the estate had been probated from letters received. It was quite awhile after the letter that I went on East.

Q. You knew, from letters you received before you say you wrote, that the estate had been probated then?

A. No, I didn't say that.

Q. Did you or did you not?

A. I don't remember.

Q. Before you started on to Minneapolis, did you and Mr. Price talk over how much you were to have out of that estate?

A. No—before I left? Oh, you mean, when Mr. Price and I went to Minneapolis?

Q. No, when you went the last time?

A. No, Mr. Price and I didn't talk it over.

Q. The matter of one-third for Donald was not mentioned between you and Mr. Price, was it?

A. One-third for Donald?

Q. One-third of the estate for Donald or the boys?

A. Why, yes, one-third of the estate was to go to the boys.

Q. I say, was that mentioned between you and Mr. Price?

A. I presume so.

Q. Well, do you recollect any talk with him about that before you started on?

A. I don't recollect any particular talk about that.

Q. Do you recollect any talk between you and Mr. Price as to your getting one-third of that estate before you started on?

A. I don't know as—

Q. I want you to tell me.

A. Mr. Price—I didn't have any talk with Mr. Price—

Q. Now, as a matter of fact, isn't it true that the first time that the matter of two-thirds of the estate occurred to you was after you got on to Minneapolis, after the estate had been probated, and after it had all been decreed over to Mrs. Smith?

A. No.

Q. You didn't mention property at all in the course

of conversation, in any definite terms like one-third, or two-thirds, or the whole, did you, to Mrs. Smith?

A. In the conversation I had with her before when I spoke about the will?

Q. When you were on there to visit, on the porch?

A. I don't think that I did designate the amount.

Q. I think you said you stayed there in the house a week or two altogether, after Mr. Smith's death?

A. Altogether I think it was about that.

REDIRECT EXAMINATION.

Q. I think yesterday afternoon, in answer on one inquiry of Mr. Mercer's, there was something said about your own father's ranch in Washington. I will ask you whether he owns a ranch? Do you mean a ranch that he owns, or does he rent it? What is that condition?

Mr. Mercer: I don't know as that is material, is it? They are living there, aren't they, on the ranch together?

Mr. Hallam: They are living there, but I think the term was used her "father's ranch." I want to show whether he owns a ranch, or whether he is simply renting a ranch.

COURT: You may answer that question.

A. Why, he is simply taking care of it. He doesn't own it, nor does he rent it.

Q. Did you write more than one letter to Mrs. Wallace with relation to the estate, or only one?

A. No, I wrote more than one.

Q. Do you remember how many?

A. I don't remember just how many, but I know there was more than one.

Q. Did you receive any answer to either of them?

A. I didn't receive any answer whatever.

Q. Do you know Jessie Carey Smith's signature.

A. Yes.

Q. I will ask you if the signature—

Mr. Mercer: If it is, I will admit the signature.

Mr. Hallam: Yes, if there is any question about the signature.

Mr. Mercer: There is no question about that, is there?

Jessie Carey Smith: That is mine.

Mr. Mercer: That letter marked "Plaintiff's Exhibit E" is signed by Jessie Carey Smith. That is admitted.

Mr. Hallam: I will offer it in evidence, if your Honor please. Your Honor will remember it has not yet been received.

COURT: The question arises again as to whether or not she had any authority.

Mr. Mercer: I don't think it is very material one way or the other, and I don't like to take up time over it, although I understand the situation to be this: If that is not satisfactory to you, you can examine the witnesses, because they will both be on. It is my understanding that Mrs. Smith just asked Jessie Carey Smith to write a letter to her, because she was busy then after the funeral and all, and that Jessie Carey wrote it in her own way.

COURT: You don't object to the introduction of that letter?

Mr. Mercer: Oh, I don't think so.

COURT: Very well. Let it go in.

Mr. Mercer: The point I was getting at was, I don't think there is any special authority to make any particular statements in the letter.

Marked "Plaintiff's Exhibit E."

REXCROSS EXAMINATION.

Q. I want to ask you one further question there: Did you receive any of these letters back from the Dead Letter Office, that you say you wrote?

A. No, I didn't.

Q. Do you know where you addressed them?

A. You mean to what address in Minneapolis?

Q. Yes.

A. I think 203—16th Street.

Q. I suppose you knew that Mrs. Smith didn't continue to live there long, didn't you?

A. Why, no, Mrs. Smith lived there until long after I had gone back to Minneapolis, I understand.

Q. Was there free delivery in Mill Valley during this time?

A. No, there was no delivery; just the Post Office.

Q. So that if letters came back to the Post Office, they would not be returned to your house, except when some one called for mail?

A. That is all.

Q. And Ned usually brought home the mail didn't he?

A. Yes.

Q. Do you remember telling Jessie Carey Smith, when you were in Chicago, that there was talk of Ned

leaving you at that time, and that you would have to go back to Mill Valley and earn your living in some way yourself?

Objected to as not cross-examination and immaterial.

COURT: I don't think that is material.

Mr. Mercer: It is only on the question, you Honor, of her having to earn her own living. That is all.

Mr. Hallam: I submit that that is too remote.

COURT: You can answer that question shortly, whether there was any talk at that time, any disagreements between you and your husband?

A. There was a disagreement between myself and my husband, yes.

COURT: At that time?

A. In Chicago, yes.

Q. But what I am asking you is whether you remember telling Jessie Carey Smith that you would have to go back to Mill Valley and earn your own living?

A. I don't remember that I said that.

Q. Anythink like it?

A. I don't remember.

Excused.

Mr. Hallam: If the court please, I desire to offer in evidence the deposition of Emily Carlson, taken by and on behalf of the defendant.

Deposition read.

Objections on the cross-examination overruled and exceptions allowed to the defendant.

DONALD PRICE,

Called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Hallam:

Are you the son of Mrs. Price, the complainant?

A. Yes.

Q. You are the eldest son?

A. Yes.

Q. How old are you, Donald?

A. 15.

Q. How old is your brother?

A. 13.

Q. Do you remember Mr. Smith?

A. Slightly, yes.

Q. Where did you see him?

A. In Mill Valley, California.

Q. Do you remember when?

A. In the year of 1906.

Q. You have heard the testimony here, have you?

A. Yes.

Q. Was it on the occasion that has been testified to here when he visited your mother there in 1906?

A. Yes.

Q. You remember him, do you?

A. Yes.

Q. How old were you then?

A. About six, I think.

Q. Do you remember anything that—the way he did with you boys? Can you describe briefly how he treated you?

Mr. Mercer: We will admit that he treated the boys very well all the while. I think this boy was small then to remember nine years; six years old; to undertake to tell now of any details that happened.

COURT: Did he seem to like you at that time?

A. He did.

COURT: Did you like him?

A. Yes.

COURT: What relations existed between you and him as to being friendly or otherwise.

A. Why, they were always friendly. He seemed very fond of us—was always bringing us things.

Mr. Mercer: We admit they were always friendly—the boys and Mr. Smith were always friendly.

Q. Did he bring you presents at that time, do you remember?

A. Yes.

Mr. Mercer: There isn't any question, your Honor, but what the boys and Mr. Smith were friendly.

Q. Do you remember what you called him?

A. Dada.

Q. And what he called you?

A. No, I don't.

COURT: Did you call him Dada or Grand-dada?

A. Dada.

Excused.

Mr. Hallam: If the court please, we desire to offer in evidence the two wills which have been mentioned here. I think they are both in the depositions; also in the stipulation.

COURT: There is no objection to the wills being in?

Mr. Mercer: Not a bit. We want them in.

COURT: Very well. Let them be offered.

Mr. Hallam: They may be considered in evidence, the will of 1902 and the will of 1906.

Mr. Mercer: It is understood that they are attached to the deposition of, I think, George P. Wilson. They are attached to a bunch of depositions of nine people taken at Minneapolis by the defendant. The first will is marked "Defendant's Exhibit 1-SKP," and it is dated May 14, 1902. The next will is dated the 10th of January, 1906, and attached to the same depositions, marked "Defendant's Exhibit 2."

PLAINTIFF RESTS.

Mr. Mercer: I will offer the depositions of George P. Wilson, George D. Rogers, Clarence A. Brown, J. W. Lauderdale, Mrs. Anna Wright, C. H. Hemperley, Stella B. Lauderdale, William A. Lancaster.

No exceptions taken.

JESSIE CAREY SMITH

Called as a witness on behalf of the defendant, being first duly sworn testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Mercer:

Your name is Jessie Carey Smith?

A. Yes.

Q. You were the wife of the nephew of Peter B. Smith?

A. I was.

Q. That has been mentioned here?

A. Yes.

Q. Did you know the plaintiff at the time she was living with Peter B. Smith after the death of her mother?

A. I did.

Q. Did you know her before the death of her mother?

A. No.

Q. After the death of the mother, were you and Arthur Smith at the home of Peter B. Smith often?

A. Very often.

Q. And about how frequently were you there yourself during the first year?

A. Oh, every two or three days, I should think.

COURT: You will have to speak a little louder.

A. Every two or three days, I should think.

Q. Were you there at long intervals at a time, or how was that?

A. No; we would go over there, I would go during the day or before dinner; perhaps with my husband at the meal time. We spent considerable time with them.

Q. And you were there to dinner often?

A. Very often.

Q. Arthur there too?

A. Who?

Q. Arthur Smith.

A. Yes, he was there.

Q. And were you frequently there when P. B. Smith was at home?

A. Yes, sir.

Q. The boys were there?

A. Yes.

Q. One boy?

A. Donald was there.

Q. The other child had not yet been born?

A. No.

Q. And did you hear any friction between Mr. Smith and the plaintiff at any time there before the marriage of Mr. Smith to the defendant?

A. Yes, I heard some.

Q. You may tell us the circumstances and what took place.

Mr. Hallam: I object, until the time is more definitely fixed.

COURT: The time is pretty well fixed.

Mr. Mercer: She says she did not know the plaintiff until after the plaintiff's mother died.

A. There were small matters about the house and about the children that raised some friction.

Q. Anything else?

A. Well, not at the house then.

Q. Well, was there at any other place, in your presence?

A. There was one occasion when I heard a quarrel between them.

Q. Where was that?

A. In Mr. P. B. Smith's office in the Chamber of Commerce Building.

COURT: In whose office?

A. In Mr. P. B. Smith's office in the Chamber of Commerce Building.

Q. At the Chamber of Commerce Building?

A. Yes, at the Chamber of Commerce Building.

Q. What brought the matter up?

A. It was his displeasure with Bess about pawning some things.

Q. You may tell us as near as you can what took place there at that time.

A. Why, it came out—I think Bess told him that she had pawned these things and that the time was up on them, that they had to be redeemed or lost; and he was very much displeased with her, and it was quite an unpleasant scene at the time.

Mr. Hallam: Now, if the Court please, I object to the answer and move that the last clause of the answer be stricken out as not responsive to the question, as a conclusion and argumentative.

COURT: The objection will be overruled.

Exception allowed.

Q. This took place before the marriage to the defendant?

A. Yes.

Q. Now, after the marriage to the defendant, did you at any time hear any unpleasant words between Dr. Smith and the plaintiff in his own home?

A. Yes. There was an occasion.

Q. What was the occasion of that arising?

A. It was at the time Bess was talking—Bess and P. B. were talking over the matter of her leaving home and trying to earn her living.

Q. Now, what took place at that time?

A. Why, P. B. recited some of the things that Bess had done that had displeased him, to me.

Q. Was she present?

A. Bess was present, yes.

Q. Yes; what part did you take in the conversation?

A. Well, I was trying to pacify P. B. in his feeling toward Bess.

Q. Go ahead and tell the court as near as you can what it was, how it arose, and what it was you were asking him to do and what he was offering to do.

A. He said that Bess had done many things that she should not, that she had displeased him in many ways, and been extravagant and wasteful, and even dishonest, in money matters with him; and that he couldn't stand it any longer. And then the question came up; something was said about her going to Chicago to see if she could find some way of earning her living; and P. B. said that he knew she would not be able to earn her living, at least from the start, and he would allow her \$25 or \$30 a month for her expenses while she was there. And I urged upon him that that was hardly enough for Bess, that she could probably not live very easily upon that amount, and told him that he should make it more. And he finally did say that he would allow her more, I think \$40 or \$50 a month, then he said he would allow her.

COURT: That was after the marriage to the defendant?

A. Yes, that was after his marriage.

Q. Now, were you in the home quite frequently—Mr. Smith's home—after he was married to Mrs. Smith?

A. Yes.

Q. And did that continue as long as he lived?

A. It did.

Q. Did you have occasion to notice the way that the plaintiff and Mr. Smith treated each other during the years that she was living there before the defendant came into the family?

A. Oh, yes; yes.

Q. You may state to the Court how they appeared to treat each other with respect to whether they were personally fond of each other—that is Mr. Smith and Bess; I don't mean the children, I mean Mr. Smith and the plaintiff.

A. Why, I don't know; they were not especially fond of each other I think, but there was nothing specially unpleasant except in small matters, matters that came up in the house and with the children.

Q. Did you see any sign of any special attachment, more than you would ordinarily see in a step-father and step-daughter?

A. No.

Q. Now, after Mr. Smith died, or at the time he died, do you remember that there was a telegraph strike on down East?

A. Yes, I remember that.

Q. Do you remember that on that account the message that was sent to plaintiff was not sent until after Mrs. Wallace got to Minneapolis?

A. Well, that was recalled to my mind by the telegram here. I didn't remember it.

Q. You do remember now?

A. Yes, I remember that the telegrams were hard to send at that time.

Q. You sent that telegram yourself, didn't you?

A. I think I did.

Q. In the name of Dewey?

A. I think I signed it.

Q. Mrs. Smith was known in the family as "Dewey," was she not?

A. Yes.

Q. And Mr. Smith in the family was usually called "P. B."

A. Yes.

Q. He was a man that was called by his initials generally by acquaintances and friends, wasn't he?

A. Yes, very generally.

Q. And you wrote the letter here which has been offered in evidence, did you not?

A. That letter to Bess?

Q. Yes. Look at it and see.

A. Yes, I wrote that letter.

Q. Was that letter dictated to you?

A. No.

Q. I notice this letter here says "Stenographer and Typewriter." You have been earning your way and that for your two daughters since about the time Bess got there?

A. Why, since 1906, I have.

Q. And Mr. Smith contributed somewhat in the

way of services and otherwise to you for a short time, did he not?

A. Yes, he did; yes.

Q. And Arthur went away?

A. Yes; Arthur went away.

Q. Arthur went away before Mr. Smith's will was changed which left out the membership for him.

A. He went away in September, 1905.

Q. September, 1905. Now, when the plaintiff came on to Minneapolis after the death of Mr. Smith, you went to the station to meet her?

A. Yes, I did.

Q. For Mrs. Smith?

A. Yes.

Q. Expecting to take her home, I suppose, to the P. B. Smith home?

A. Yes; I went in Mrs. Smith's automobile to the depot.

Q. And they missed you and went to the house alone?

A. Yes.

Q. You saw more or less of them while they were there on that occasion?

A. Yes, I did.

Q. Did you ever, at any time, in Mr. Smith's lifetime hear him and the plaintiff discuss any property, or will, or provisions for property, or anything of that sort?

A. No.

Q. For herself and the children?

A. No, I never did.

Q. By the way, before I leave that—How was Mr. Smith's general method of conversation—was he voluminous or brief?

A. Well, I don't think he was very much given to discussing his affairs, his family affairs.

Q. From what you saw of him there, was he accustomed to repeating what he said?

A. No, he was not very talkative.

Q. He was a man, in fact, who said very little, wasn't he?

A. Yes, comparatively little.

Q. He was not accustomed to repeating what he said?

A. No.

Portland, Oregon, June 24, 1915—10 A. M.

Mr. Mercer: In one of the letters that was introduced that was written by Mr. Smith,—the right to object to which I reserved until I should see the letter—there is a statement about Arthur Smith having gone wrong, and it has no relation that I can see for it to come in here; and his wife is here, and she has two grown daughters, or one just through the high school and the other about that age; and I would hate to have any record on here that was not necessary.

COURT: That was in a letter?

Mr. Mercer: Yes; and I can submit part of the letter and keep the rest of it out of the record.

COURT: I did not get that letter. Withdraw it from the files and read into the record such part as you want, and then this need not go in at all.

Mr. Mercer: Yes, there is some of it that is material, that both of us want.

Mr. Hallam: I introduced the letter, but I know no reason why that should go in.

COURT: That is the better way; then there will be no record of it at all.

Mr. Mercer: So far as Defendant's Exhibit C-7 is concerned, the reporter may copy it, leaving out the portion cut out by parentheses, and the copy will then be substituted for the original and the original withdrawn.

JANE CLARKE

Called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Mercer:

You live in Portland, Miss Clarke?

A. Yes.

Q. Do you know the plaintiff, Mrs. Price?

A. Yes.

Q. You knew her at the time she lived with P. B. Smith?

A. Yes.

Q. You were a friend of hers?

A. Yes.

Q. Were you at the P. B. Smith home the night that Mr. Smith and Mrs. Smith, who is now Mrs. Wallace, became engaged?

A. Yes.

Q. You may tell us what took place that evening there, so far as you saw.

A. Well, Mrs. Price and I had been at a party in the evening with some friends.

Q. A little louder.

A. Mrs. Price and I had been at a party with some friends in the evening, both to the dinner party and theater afterwards, and when we came home, why, Mrs. Wallace—

Q. Mrs. Grahame, it was then.

A. Yes; Mrs. Smith—told us—well, I remember her telling us about her engagement. That is about all.

Q. Now, do you remember the room that was occupied by yourself that night?

A. Yes.

Q. How many were in it?

A. Well, I slept with Mrs. Smith—Mrs. Wallace—and Mrs. Price.

COURT: You will have to speak a little louder.

A. Three of us slept in the room.

Q. You slept with Mrs. Grahame?

A. Yes.

Q. And Mrs. Price, whom we call Bess, slept on a couch in the room?

A. Yes.

Q. Did you hear Mrs. Grahame tell about the engagement to Mr. Smith that evening.

A. No, I don't remember of her telling of the engagement.

Q. She didn't say anything about the engagement there?

A. Well, I don't remember when she told it, but I remember she told of the engagement that evening.

Q. Told of the engagement that evening?

A. Yes.

Q. Did you occupy a room with them all night?

A. Yes.

Q. Were you and Bess up in the room when Mrs. Grahame came up, do you remember?

A. I think we went in her room. I think she was reading to Mr. Smith that evening, and we went in there. We went in to talk with them.

Q. You went in to talk with them?

A. Yes.

Q. Well, now, when she told about the engagement, was there anything said by her to Bess about property matters or anything of that sort?

A. No.

Q. Or about her not intending to come between Bess and Mr. Smith?

A. No, I heard nothing of that.

Q. Did she take Bess on her knee, or in her arm, or anything of that sort?

A. Not that I know of.

Q. Didn't see anything of that kind?

A. No.

Q. Or hear anything of that kind?

A. No.

Q. Next morning were you down at breakfast?

A. Yes.

Q. And do you recollect whether you were all down to breakfast together?

A. I don't remember.

Q. You don't remember?

A. No.

Q. Didn't hear any discussion next morning about any property or anything of that?

A. No.

CROSS-EXAMINATION.

Questions by Mr. Hallam:

Miss Clarke, were you in the presence of the complainant and the defendant at all times during that evening after you returned home?

A. No; not that I remember. I don't remember.

Q. The next morning were you in the presence of the complainant and Mr. Smith at all times after you came down to the dining-room?

A. No.

Q. Were they down before you? Do you remember as to that?

A. I don't remember.

Q. I don't think I quite understood who it was was reading to Mr. Smith in his room.

A. Mrs. Grahame was reading, as I remember it.

Q. Was reading to him?

A. Yes; during the evening.

Q. What place had you attended that evening?

A. We went up to Miss Marshall's to dinner. Miss Marshall, a girl by the name of Maude Marshall—and afterwards we went to the theatre, to a theatre party.

Q. And who accompanied you?

A. Well, there were two men from St. Paul; one was named Bill Finch—

Q. I mean who of the party. I merely wished to

learn whether the complainant and the defendant went with you, or either of them.

A. Mrs. Price was with me.

Q. Did the defendant?

A. No.

Q. Oh, she was not present?

A. No.

Q. She remained at home that evening?

A. Yes.

Q. Are you clear, Miss Clarke, that that is the evening that the engagement occurred?

A. Yes, I am.

Q. Then your understanding is that the engagement was made at the house there that evening?

A. As far as I understand it.

Q. Well, now, do you know when that was—can you fix the date of that approximately? In the first place, do you remember the year?

A. I don't remember the year.

Q. And you don't remember the month, or do you remember the month, or approximately the day of the month?

A. No, I don't remember.

Q. Well, then, will you tell, please, a little more definitely how the news was broken that the engagement had been made. Can you tell the conversation, how it arose?

A. No. I think we were simply told when we came in, and that was all. I don't remember anything else about it.

Q. Who told you?

A. Why, Mrs. Grahame.

Q. When you came in. Did she meet you at the the door?

A. I don't remember that.

Q. Don't remember? Where was Mr. Smith at that time?

A. He was in the house.

Q. Did you see Mr. Smith?

A. Yes.

Q. Where did you see him?

A. Saw him when we went in, as I remember, when we went in the room after they had been reading together that evening.

Q. You went into his room?

A. I think so.

Q. You all went into his room?

A. I think so.

Q. Are you clear in your recollection of that?

A. I am not positive.

Q. Was anything said by him about the engagement?

A. No; not that I remember.

Q. It was not mentioned in his presence?

A. I don't remember that it was.

Q. You were not present when the defendant told you—I mean Mr. Smith was not present when the defendant told you about the engagement?

A. I don't remember if he was.

Q. You said she met you at the door and told you about it?

A. Oh, no. I said I didn't remember when she told me.

Q. Perhaps I misunderstood you. Then I will ask you if you remember where it was that she—if you can remember—where you were when she told you of this engagement?

A. I don't remember where we were.

Mr. Wood: Whom do you mean by she?

Mr. Hallam: I said the defendant.

Mr. Wood: She said Mrs. Grahame.

Mr. Hallam: That is the defendant here, Mr. Wood.

Mr. Wood: Excuse me, then.

Mr. Hallam: I use it as probably the most convenient.

Mr. Mercer: I used that term. That is what the name was then.

Q. Now, Miss Clarke, do you remember where you were when the defendant told you this news?

A. No.

Q. But I think you did say that she met you at the door when you came home?

A. No, pardon me. I didn't say she met us at the door. I don't remember of her meeting us.

Q. You don't remember where you first met her?

A. No, I don't. I think we went in the room there, but I am not sure.

Q. But I think you did say that as soon as you returned home, to the house, she told you. Is that the way?

A. I don't remember where she told us; but I think we went in the room where they had been reading. I

don't remember anything about when she told us or where she told us.

Q. Do you think it was in the room there where they had been reading?

A. No, I don't think it was. I don't think it was in the presence of Mr. Smith.

Q. Didn't you just say in the last answer that you thought it was in the room —

A. No, I didn't.

Mr. Mercer: A different room, Mr. Hallam.

Q. What room are you referring to now, that you think it was?

A. I don't know where it was.

Q. Are you quite sure that is the first time you heard of the engagement?

A. Yes.

Q. That evening, that occasion?

A. Yes.

RE-DIRECT EXAMINATION.

Q. You do remember that you and Bess had been out for the evening?

A. Yes.

Q. With Maude Marshall somewhere?

A. Yes.

Q. That you were informed of this engagement when you came in?

A. Yes.

Q. You don't remember exactly what part of the house you were informed in?

A. No.

Q. But you do remember you slept in the same room that night, all of you?

A. Yes.

Q. And that you didn't hear anything of the kind, of property or matters which I asked you about a while ago?

A. No.

Examination by the Court:

Q. Had you been acquainted with the defendant prior to that?

A. Yes.

Q. For how long?

A. I don't know how many years.

Q. Was your acquaintance intimate?

A. Yes.

Q. As friends?

A. Yes.

RE-DIRECT EXAMINATION Continued,

Q. Now, you and Mrs. Grahame and you and Bess were both friends?

A. We were friends.

Q. And you had been friends for some time?

A. Well, I don't know how long.

Q. Well, you were there as Bess's guest?

A. Yes, I was there as her guest.

Q. And not as Mrs. Grahame's?

A. No.

Q. And you and Bess and Maude Marshall were all friends, in a way?

A. I was not a particular friend of Maude Marshall.

RE-CROSS EXAMINATION.

Q. By whom were you first introduced to the complainant?

A. Either by Miss Bates or Mrs. Grahame.

Q. Don't you recollect that it was by the defendant?

A. I don't know that it was. I don't remember.

Excused.

Mr. Mercer: Mr. Hallam, I have here such of the check books of Mr. Smith as we were able to find of a personal nature, and you can look at them and see if you have any objections to the handwriting. I understand that the plaintiff testified that she received \$100 a month when she was West until she was married to Mr. Price, and that after that there was \$50 a month sent on for the boys. Now, if there is no question about that, it may not be necessary to encumber the record with these check stubs. There are a number of them that would correspond with that idea.

COURT: I don't think there is any use of further testimony on that. That is a matter admitted by the plaintiff and it is what you claim.

Mr. Mercer: That is what I think. I wanted to be sure there was no question about it.

Mr. Hallam: There is no question about it.

Mr. Mercer: Then these check books here, Mr. Hallam, would show that the last money that was sent—I will call your attention to it so you can see exactly. I think that we can shorten matters. There is a stub of \$2000.

Mr. Hallam: There is no doubt that he made that remittance.

Mr. Mercer: On October 20th. It will just be admitted.

Mr. Hallam: Yes, we admit the payment of the \$2000.

Mr. Mercer: I have a check book here of October 12, 1906, showing a check to Joseph Chapman, Jr., cashier, for a New York draft for E. J. P., which I understand is the \$2000 that went to Mr. Price, for which the note was given and afterwards came back to Bess.

COURT: If there is no question about that, it may be admitted.

Mr. Mercer: If there is no question about that, I won't bother the record with it.

COURT: Very well.

Mr. Mercer: Now, the last remittance that I find in any of these check books as having been made by Mr. Smith to Bess was on December 13, 1906. It is in check No. —, the first check is blurred; I think it is 1168. It is \$100.10. It is marked "For Bess." Prior to that for some time the checks had been each month \$50.10 and simply marked "For Bess," in his writing. And that is the last that we can find that any remittance was sent to her. We have the check books here down to the time he died. If there is no question about that, I won't offer them.

Mr. Hallam: I am not questioning the check books, but as to that being the last remittance I am not prepared to say at this time. He sometimes sent drafts, I think.

Let me ask the date of the last remittance which this book indicates.

Mr. Mercer: December 13, 1906.

Mr. Hallam: I will call attention to the fact that one of the letters in evidence calls attention to a remittance in 1907.

Mr. Mercer: The fact I want to show is, that the check books are here for several years back, that they are drawn in substantially the same way, that they show \$50 remittances from the time that Mr. Price married Bess down until about the first of December, 1906, that after that the check book shows no further indications of any remittances to her or for the boys, or anything of the sort, and that it shows no remittances to the boys at all, except such as are marked "For Bess," and that these check books are in Mr. Smith's own handwriting. I can prove that by this witness, if there is any question about that.

Mr. Hallam: Here is a letter March 1, 1907, in which he said, "I enclose draft of \$25," and he says he thinks she better spend about \$5 of it for Donald's birthday present and use the balance of it. Whatever it is for, it doesn't appear in that book.

Mr. Mercer: It doesn't as far as I can find. I have had the book checked over by clerks. We have the stubs for March 1st—two checks, one to Jessie Carev Smith, not marked for any consideration; the other is to L. Torrens for rent. March 2nd is another check to somebody else; February 27-28, there are none, February 26-7, and not to Bess.

COURT: I don't think that is material except to

give the general idea that Mr. Smith made remittances after the marriage to Mr. Price for the children's benefit only, except this one.

Mr. Mercer: And then he ceased that after he loaned them the \$2000 to build the house with. That is the point I want to cover.

JESSIE CAREY SMITH resumes the stand.

Direct Examination continued.

Questions by Mr. Mercer:

Mrs. Smith, I asked you yesterday if you were back and forth at the home of Peter B. Smith following the time of the death of his second wife and after Bess was living there with him, when Doctor MacLean was there. I understood you to say you were at that time.

A. I was, yes.

Q. Now, after Doctor MacLean went away, were you there less or more frequently during the next nine or ten months?

A. Oh, I was there more frequently after the doctor went away.

Q. How did that happen?

A. Why, P. B. asked me to be with Bess a great deal, to keep her company and be with her.

Q. That is during, you remember the time when they ascertained that she was pregnant?

A. Do I remember what?

Q. The time when they ascertained that she was pregnant?

A. Yes, I remember that time.

Q. Was it after that that he asked you to be with her a good deal at the house?

A. Yes; yes, it was.

Q. Now, during those months were you in and out of the house frequently and for long periods of time?

A. Yes, I was.

Q. Hours at a time?

A. Yes.

Q. When he was there too?

A. Yes.

Q. And when he wasn't there?

A. Yes, both.

Q. You and Arthur lived not far from them?

A. Well, we lived not very near them, but we went there a great deal.

Q. And your families were very close friends?

A. Yes.

Q. During this time you and Mr. Smith, and you and Bess and Arthur all talked confidentially about family affairs, didn't you?

A. Yes.

Q. Did you ever hear Mr. Smith say anything to Bess about leaving her his property, or anything of that sort?

A. No, I never heard that.

Q. Or that she should be his daughter, or anything of that kind?

A. No.

Q. Or that he wanted her to take care of him, or anything or that sort?

A. Wanted her to take care of him?

Q. Yes.

A. No.

Q. Who was it that apparently, from what you could see, was doing the caring?

A. Well, P. B. was caring for Bess.

Mr. Hallam: I object to these questions as leading. State the conversations, what was said. He is leading the witness all along.

Mr. Mercer: I am asking the witness what appeared to her.

COURT: I will overrule the objection.

Q. I want you to tell us how it appeared there, as to whether Mr. Smith was taking care of her, or whether she was taking care of him. Give us the situation so the Court will understand.

A. I understood P. B. was giving her a home there, that she had no other place to go and that he was giving her a home.

Q. The matter of how to take care of her, what should be done respecting the family, etc., was talked, was it, back and forth between you and P. B. and Arthur?

A. Yes.

Q. Did you see any indications during any of that time of Mr. Smith attempting to coerce her into doing anything like giving up Donald, or anything of that sort?

A. No, I never heard that; never heard that talked.

Q. Never heard anything of that sort?

A. No.

Q. Did you see anything in connection with the whole transaction that would look like Mr. Smith was other than the very kindest to her during that time?

Objected to as calling for a conclusion.

Objection overruled.

Exception allowed.

A. Why, he was kind to her.

COURT: What was that answer?

A. He was kind to her.

Q. Well, during this time that I have been asking about, young Donald MacLean—that is the little boy—was living there at the house?

A. Yes, sir.

Q. When speaking about the time when Donald left, I meant the doctor?

A. Yes.

Q. During the time that you were living there together, did you hear any discussion, any talk between any of them about getting any home, having any different house or bigger house for the family to live in?

A. No, not for the entire family to live in.

Q. Well, did you hear anything about a house to live in somewhere else, at any time there?

A. Yes, I was there once when Bess told me that she and Donald wanted a separate house; that they had been or were going that day to look for a house for her and Donald.

Q. That is, you mean the doctor when you say "Donald"?

A. I mean the doctor. That was before the doctor left.

Q. That was before he went away?

A. Yes.

Q. You may state whether or not Bess talked with

you on numerous occasions about intending to go to Donald after he left?

A. Oh, yes, she did.

Q. What did she tell you?

A. That she always intended to go to him. There was never anything else.

Q. Did there come a time finally when she spoke to you about getting a divorce?

A. Yes. She told me one evening at our home.

Q. Tell us what she said.

A. That she had made up her mind that she could not go to Donald and he would not be able to care for them; that he had gotten into further trouble out where he was; and we knew from what he had written that he had been in trouble out there and in jail; and that she could not go to him and that she intended getting a divorce.

Q. Was there anything said in that conversation as to whether Mr. Smith knew anything about her intentions up to this time about getting a divorce?

A. She hadn't told him then.

Q. She said—Tell us what was said.

Mr. Hallam: Do you know whether she told him then?

A. Well, I remember that I told her that she would better tell him about it if she made up her mind to it, and that she said she was going to tell him.

Q. Was that a short time before she applied for the divorce, do you recollect?

A. I don't know just—I don't know about that; it was, of course, before she applied for the divorce.

Q. And after she made application for the divorce, did you see any change in affairs there from that time on?

A. In what way?

Q. I mean in the way she was living there.

A. No.

Q. Any difference in appearance, or anything of that sort?

A. No.

Q. Now, before Mr. Smith was married to Mrs. Grahame, was Bess back and forth to your house and Arthur's frequently?

A. Very frequently.

Q. You may state to the Court, tell the Court what the situation was as to whether she always spoke kindly of Mr. Smith, or whether she nagged about him. Tell the Court what the actual situation was and whether you heard talks with her and Arthur about that matter, and what they said.

A. Why, I have heard Arthur cautioning her to be more considerate of P. B. and to treat him with more consideration; that he thought P. B. deserved it and it would be better all around for her to treat him with more consideration. And she was rather critical of P. B. to us, speaking to us about him and criticizing him.

Q. This was before Mrs. Grahame came into the family at all?

A. Oh, yes; this was before that.

Q. Did you see anything, in all your going back and forth to that household that indicated that the plain-

tiff was doing any special service in the home or looking after Mr. Smith especially in any way?

A. Why, no.

Q. Or doing any of the things that a housekeeper would generally do, in any particular way?

A. Why, no, I don't think that I did.

Q. You spoke of being at the office at one time when the question of pawning things came up as between Bess and Mr. Smith. Was that before Mrs. Grahame was married to Mr. Smith?

A. Yes, it was.

Q. You spoke then of being at the house at a time when Bess was talking about going away, and Mr. Smith was talking about giving her a partial allowance. Was that before or after he was married to Mrs. Grahame?

A. That was after he was married.

Q. Do you know how that occasion came about?

A. Why, I remember that Arthur and I were over there and in the library with Mr. Smith and with Mrs. Smith and Bess; and P. B. was telling us about Bess and about her pawning these things, and he said that she could not stay there any longer, that she had been ungrateful to him and that she had been doing these things that he disapproved of and that he could not have her there any longer. Then was when the conversation came up, which I gave yesterday, about her going to Chicago.

Q. Well, now, did Mrs. Smith—that is the present defendant—did the defendant in this case take any part in that conversation that you recollect?

A. Not that part of it, no.

Q. Did she in any part of it.

A. Yes. P. B. was very angry because Bess had pawned her mother's jewelry, the jewels that had been her mother's, and he had—I think he had at that time—redeemed them, or else he had the tickets there or something of that sort; and he said that he should turn those jewels over to Dewey—Mrs. Wallace. And Dewey then spoke up and refused, and said that she could not have it that way; that she would not have it that way; that he must keep them; that some time he would feel like giving them to Bess again. That is all that I remember of her saying.

Q. Now, do you remember any other time when she took part in any of the controversies in any way at any time you were there?

A. You mean the defendant?

Q. Yes.

A. No, I don't believe so. I never heard any.

Q. Did you go in and out of the house frequently after she was married to Mr. Smith?

A. Yes, we were there.

Q. Were there often to dinner?

A. Yes, sir.

Q. And evenings?

A. Yes.

Q. And various times?

A. Oh, yes, sir.

Q. Did you ever see or hear Mrs. Smith enter into any of the controversies between Mr. Smith and the plaintiff at any time?

A. No, I never heard her.

Q. Did you have occasion to observe how she treated the boys?

A. Oh, always very nicely.

Q. You were there during the times when Bess was away on the stage?

A. Yes.

Q. And the boys were there?

A. Yes.

Q. In the care of Mrs. Smith?

A. Yes.

Q. They generally had a nurse?

A. Yes, they had a nurse.

Q. And did you at any time see any controversy between Mrs. Smith and the plaintiff in any way there?

A. Between Dewey and Bess?

Q. Yes.

A. No, I never did.

Q. Now, do you remember the occasion of when you heard of the engagement between Mr. Smith and Mrs. Grahame?

A. Yes, I remember.

Q. Where did you hear that?

A. At my home.

Q. Who told you?

A. Bess told me.

Q. Who came with her over there?

A. Well, she and Dewey drove over together in the morning; I understood it was the morning after the engagement; and Bess told me.

COURT: Who were together?

A. Bess and Mrs. Wallace came over.

Q. Mrs. Grahame it was then?

A. Mrs. Grahame then.

Q. Drove over to your house together and told you about it?

A. Drove over to my house together.

Q. How did Bess appear that morning?

A. She was very much pleased about it.

Q. Now, after Mr. Smith came home from the wedding trip with Mrs. Grahame, almost immediately after, do you remember a controversy arising between him and Bess with respect to a bill down town—a dress bill, or anything of that sort?

A. Oh, a dress-maker's bill?

Q. Yes.

A. Yes, I remember something about that.

Q. Do you remember what was done about that?

A. I remember that he wanted Dewey and me to go down and pay it, pay the bill. I think he thought the bill had been paid—he did think the bill had been paid, and when he found it wasn't he didn't want Bess to do it; he had Dewey and me go and pay it.

Q. It was one of her bills?

A. One of Bess's bills?

Q. Yes.

A. Yes.

Q. Do you remember how much the bill was?

A. About \$85 as I remember.

Q. Now, you remember the occasion when Bess and Mr. Price came on to Minneapolis after the funeral of Mr. Smith?

A. Yes.

Q. And do you remember that after Bess had examined the will you had some talk with her?

A. I had some talk with her after she knew what the will contained.

Q. And that was there in Minneapolis?

A. Yes, at my home.

Q. At your home?

A. Yes.

Q. Did they come over to visit you at that time?

A. Yes, they were at my home.

Q. You may tell the Court what she said about it at that time.

A. You mean the conversation between Bess and me?

Q. Yes.

A. She said that she was very much disappointed at the way things had been left; and I said to her, "Well, Bess, I don't suppose you expected P. B. to leave you anything." Well, she said, she thought he might have remembered the boys.

COURT: What was that?

A. Might have remembered the boys in his will.

Q. Now, after the Prices started back to California and a letter came on to Mrs. Smith from Chicago about wanting money. Did you know about that?

A. Yes, I knew about it.

Q. And did you go down to Chicago for Mrs. Smith?

A. Yes, I did.

Q. To see them?

A. Yes, I went to see them.

Q. Partially?

A. Yes.

Q. And how did you happen to go?

A. Well, they had written for money and said that Bess was ill; and we were not sure how things were about that; and we thought it best for me to go down and see about it.

Q. That was after the wire was sent?

A. Yes.

Q. Which you saw there?

A. Yes.

Q. And when you got down there did you have a talk with Bess as to what she expected to do after that?

A. As to what she expected to do?

Q. Yes.

A. Yes.

Q. Tell us what that was.

A. Why, she was going home.

Q. Going home?

A. Yes.

Q. Anything said about Donald going with her?

A. About Donald going with her?

Q. I mean about Ned going with her. I get these husbands mixed.

A. The day they went away there was some conversation about Ned going with her. It looked for a time as though he might decide not to go.

Mr. Hallam: If the Court please, I object to this as immaterial.

Mr. Mercer: The point I am coming to on that is

to get the part of the conversation where Bess said what she expected to do if he didn't go.

COURT: Well, you may testify to that.

A. She spoke about going back to Mill Valley and taking care of the boys there and earning her living some way, doing something. She said they had their little home there and she would go back to them alone and take care of them some way.

Q. Nothing said at that time about claiming to be any will, any contract for a will with Mr. Smith?

A. No, there was never anything of that sort said to me.

Q. You never heard of such a thing until after this estate was probated?

A. Never heard of such a thing. I never heard of it.

Q. I am not sure that I asked you, but in order to make sure I will ask you if Peter B. Smith was a man who, in your observation of him, talked much in the way of repeating himself, or things of that sort?

A. No, I would not think he was.

Q. You never saw any indication of that sort of thing in your dealings with him, did you?

A. No.

Q. Mr. Smith, during the time that Bess was living there with him, to your knowledge was a man who had many friends among business men, such as bankers and officers of trust companies and people of that sort?

A. Yes; yes, many. I think every one knew him in Minneapolis.

Q. There were two or three trust companies there, the officers of which were friends of his?

A. Oh, yes.

Q. Now, what would you say as to whether or not P. B. Smith was a man who kept his word in his dealings, in his relations with his family, and everywhere?

A. I think he was immaculate in that regard.

CROSS-EXAMINATION.

Questions by Mr. Hallam:

Did you ever hear Mr. Smith call the complainant his daughter?

A. I don't remember of hearing him say his daughter. He spoke of her always as "Bess."

Q. Did you ever hear him call her, speak of her as his adopted daughter?

A. No, I don't think so.

Q. Was the language in which you heard him speak of her at variance with that?

A. Why, he always called her Bess, and we always knew her very well as Bess.

Q. Are you a friend of the complainant's?

A. Of the complainant, Mrs. Price?

Q. Yes.

A. Why, I have not seen much of Mrs. Price in late years.

Q. Were you ever a friend of hers?

A. Yes.

Q. Was there any circumstance that ever terminated that friendship?

A. No, I don't think so. I have no unfriendly feeling toward Mrs. Price.

Q. Were you a good friend of hers?

A. Yes.

Q. A warm friend?

A. Well, we were very intimately associated at one time during our life, during the time when she was alone there after her mother died and before her baby came, especially.

Q. Well, you considered yourself a close friend of hers at that time?

A. Yes, I did.

Q. During that period since her mother died?

A. Yes, sir.

Q. Nothing has transpired since that time to break that friendship, that you know of?

A. We haven't kept up a close association. I should rather say we had somewhat drifted apart, more than anything.

Q. But there has been no particular circumstance upon which you have drifted apart?

A. No, I don't think we ever quarreled, anything of that sort.

Q. Now, did Mr. Smith, during that time in which you were closely in communication with him and the complainant, treat her as a father or as a friend?

A. Why, he treated her very friendly, and I know he took care of her, as has appeared here, and looked after her.

Q. Did he during that time treat her as a father or as a friend?

Mr. Mercer: Just a moment. I think that is hardly a proper question.

COURT: Of course that calls for a conclusion, but you may answer that question.

Witness: I don't know how to answer it.

Mr. Hallam: Especially in view of the manner in which she has undertaken to say, your Honor—

A. He treated her very kindly, and looked after her interests.

Mr. Hallam: Will you read the question?

Question read.

A. Well, he treated her as a friend, I know, as though he were a friend of hers.

Q. Then if he should, on subsequent occasions, at various times, write her signing himself as a father, would you say that his relation to her had meantime changed for the better or closer?

A. No.

Mr. Mercer: That is speculative as far as this witness is concerned, it seems to me. If you have any such letters they should be produced.

Mr. Hallam: I will produce them now.

Q. I show you Complainant's Exhibits C1, C2, C3, C4—

COURT: He signs them "Dad" doesn't he?

Mr. Hallam: Yes.

Mr. Mercer: He doesn't say "Father."

Q. (Continued) C5, C6, C7, C8, I call your attention to the signatures to those letters and will ask you if those—

A. You mean from here on?

Q. Yes. Are the letters of a friend or of a father?

A. The signature you want me to see?

Mr. Mercer: I don't think that is a proper question.

COURT: I think that is not proper.

Mr. Hallam: I will withdraw the question.

COURT: The Court will interpret those letters.

Q. I show you Complainant's Exhibit E and ask you if that letter was written by you to the complainant?

A. Yes.

Q. And was it written at or about the date specified in the letter?

A. Yes, I presume so.

A. And shortly after Mr. Smith's death?

A. Yes; telling her about it.

Q. In this letter, I will ask you why you stated to the complainant "I know that you must feel, with many of the rest of us, that you have lost a dear friend?"

A. Why I said that?

Q. Why did you say that?

A. Because I believed it; I thought it; I said that he had treated her as a friend.

Q. You didn't believe that he was a father, or an adopted father?

A. Well, I knew that he wasn't her father; everybody knew that.

Q. Not her natural father?

A. No.

Q. But you didn't believe that he treated her as an adopted father?

Mr. Mercer: Just a moment. I think that is calling for a conclusion as to what an adopted father is.

Examination by the Court:

Q. In the conduct of Mr. Smith toward Bess, did he seem to regard her as a daughter in the ordinary way that a father would regard a daughter?

A. Why, he took care of her; he cared for her and exhibited a great deal of solicitude about her welfare.

Q. Well, did you notice anything different in his treatment of her as a daughter than you would a natural father?

A. I never thought P. B. entertained a great deal of affection for Bess or she for him; unusual affection for her nor she for him; but felt that he took care of her—I mean in the sense of taking care of her; but I never felt—because there was much constraint between them so much of the time.

Mr. Hallam: Objected to as not responsive and argumentative.

COURT: This is what the Court was asking for, wanted to get at.

Mr. Hallam: I submit that the answer is not responsive to the Court's question.

COURT: It will not be stricken out, because I think it is pertinent.

Examination by Court continued:

Q. In what way did he differ in his treatment toward Bess than the way an ordinary father would treat his own daughter?

A. Well, I don't think he was so affectionate to her as fathers are to their daughters.

Q. Did he show affection for her in any way?

A. Well, you mean—not in caressing or that sort of thing, you mean?

Q. Well, in their relations one to another.

A. She was a married woman before I knew her, and in their associations afterwards, as I say, I never noticed any particular affection. I think that he was very much interested in her welfare and did his best for her, gave her a home there, took care of her; but I never noticed any unusual affection on either side.

Q. You never knew her then until after she was married?

A. I never knew her until after she was married.

CROSS-EXAMINATION Continued.

Q. During the years while complainant lived with her father and mother, before her mother's death, you did not know the complainant at all?

A. I did not know her until a day or so after her mother died.

Q. Never met her; never knew the complainant's mother?

A. Yes, I knew her mother slightly. Her mother was ill when I first became acquainted with her, I think only a month or two before she died.

Q. You have no knowledge of his relations with her at that time, or what might have been his affections for her during those six or seven years?

A. I never knew her then.

Q. Mrs. Smith, you testified yesterday in relation to this telegram, Complainant's Exhibit D, which was sent to the complainant after Mr. Smith's death.

COURT: Just let me see that telegram.

Q. That you sent this wire for the defendant from Minneapolis.

A. Why—may I see it, Mr. Hallam?

Q. I will show it to you, yes.

A. I don't remember the circumstances of sending it, but I was notifying the friends in Dewey's name so I suppose—I think I sent it. I think we talked about it.

Q. You stated in your testimony yesterday that by reason of a strike of the telegraph operators this telegram was not sent earlier.

A. Well, yes, there was a strike at that time.

Q. That was the reason it was not sent earlier?

A. No; you will notice I say when the funeral will be there, and we didn't know about the funeral until some time after his death—that is, two or three days. They were East. It was impossible to get telegrams back and forth with any degree of promptness, and we could not learn from them by telegram, I think. I think we didn't know until after they got home with P. B.'s body when the funeral would be.

Q. Well, now, let me be clear; as I understand this telegram, as far as you recollect, was sent from Minneapolis. It appears to be from Minneapolis.

A. Oh, yes.

Q. And on the 20th.

A. Is that the date? I don't know the date.

Q. If that date appears there, you think that is correct?

A. It says "8-21."

Q. That is received 8-21; but 8-20 is the date sent.

A. Minneapolis 8-20; then it was sent that date.

COURT: That was four days after the death of Mr. Smith?

Mr. Hallam: Yes, your Honor.

COURT: He died on the 16th.

A. It is possible that we had the news in some way by telegram as to when the funeral would be, before they got there.

Q. I want to get at what you mean with reference to the telegraphic strike making delay. Did that make the delay in the notification of this complainant of the death of Mr. Smith?

A. Well, I don't know that it did. Did I say that yesterday? I don't remember.

Q. I understood you to say so.

A. I don't remember thinking about that. I don't remember making that statement or having in mind that that was the reason that I didn't try to telegraph her before.

Q. Don't you remember testifying on that point yesterday, in your testimony?

A. I remember something about the telegram was mentioned.

Q. Don't you remember mentioning the telegraphic strike yesterday?

A. Yes.

Q. Do you remember what you said about it?

A. No, I don't remember.

Q. Don't remember what you said yesterday about it?

A. No, I don't remember what I said yesterday about it.

Q. Isn't it true that you said yesterday in substance that by reason of the telegraphic strike there was a delay in this telegram?

A. Well, I had in mind that there was a delay of telegrams. I don't remember that you mentioned that particular telegram. We were having a terrible time getting telegrams from the East from Mrs. Wallace when P. B. died. I know there was a strike and a great delay in telegrams at that time on that account.

Q. Do you now know whether the strike made any delay in sending the telegram to this complainant?

A. I don't know whether it did or not.

Q. You don't know?

A. No.

Q. You didn't know yesterday, did you?

A. No; and I don't know today.

Q. Do you know of any conceivable reason, or did you yesterday, why this defendant did not notify this complainant by wire of Mr. Smith's death before August 20th, 1907?

A. I don't know anything about it.

Q. Did you know any reason yesterday?

A. No.

Q. Do you know Emily Carlson?

A. Yes.

Q. You live in Minneapolis, don't you?

A. Yes.

Q. Do you know when Emily Carlson gave her deposition in this case?

A. Yes. I could not tell you the date, but I knew when she did give it.

Q. You have taken a good deal of interest in this case, haven't you?

A. Yes, I am interested in it; know all about it.

Q. Did you call Emily Carlson to your office—You are engaged in business in Minneapolis?

A. Yes.

Q. Public stenographer.

A. Yes.

Q. In the Metropolitan Life Building?

A. In the McKnight Building.

Q. In the McKnight Building?

A. Yes.

Q. I think you were formerly in the Metropolitan Life Building?

A. Yes.

Q. Well, that is immaterial. You called Emily Carlson down to your office to talk to her about this case after this deposition that was read yesterday was taken, did you not?

A. No.

Q. Wasn't she there?

A. No; never after this. She was there before. She was there that day, but never afterwards that I know of.

Q. When was she there last?

A. The day her deposition was taken.

Q. What was the date that she was there last?

A. I don't know. I haven't any idea.

Q. Approximately, what was the last date that Emily Carlson was in your office in the McKnight Building?

A. I don't know the date, Mr. Hallam. She was there the date her deposition was taken. She has never been there since.

Q. Cannot you tell approximately?

A. I don't know.

COURT: The deposition will show that.

A. It must have been about in March, Mr. Hallam.

Mr. Hallam: My point is it was—

A. It must have been about in March; I don't know; It is the day her deposition was taken, I know that.

Mr. Mercer: Let us see the deposition, if it is material in any way.

COURT: You are asking her whether she was there after the deposition was taken. She remembers she only saw her at the time the deposition was taken.

A. No; I saw her once before.

Mr. Hallam: I will withdraw the question.

Q. Mrs. Smith, you say that the complainant came over to your house on one occasion and told you that she had decided to get a divorce?

A. Yes.

Q. You told her that you thought she had better tell Mr. Smith about it?

A. I told her if she decided to do that, that she better tell Mr. Smith about it.

Q. Well, you knew that she had no means of obtaining a divorce, of her own, didn't you, at that time?

A. I knew that she had not?

Q. Yes.

A. I didn't think she had any means of doing anything.

Q. Did you know of any way she could get a divorce unless Mr. Smith co-operated with her?

Objected to as calling for a conclusion.

COURT: I think she has answered the question.

Q. You testified yesterday, I think, in answer to one question of counsel, that Mr. Smith said that the complainant was careless and even dishonest in money matters.

A. Yes. It was very harsh in its nature.

Q. That was soon after his marriage to the defendant?

COURT: Who is that you are talking about?

Mr. Mercer: Mr. Smith.

Mr. Hallam: The question was whether Mr. Smith made the remark to her concerning the complainant.

A. I don't think it was soon after; it was when the discussion was going on as to what Bess was going to do; that she was leaving their home—and in connection—

Q. Well, I am not asking for that now, Mrs. Smith. I am simply asking you to fix the time as near as you can, if you can.

A. I have an idea that it was in the fall of that year.

A. In the fall, you think?

A. I think so.

Q. This episode to which you refer concerning the payment of debts at a dressmaker's, was immediately after Mr. and Mrs. Smith returned from the wedding trip?

A. I remember that it was in warm weather, and my

best memory about that would be that it was probably early in the summer.

Q. That was for some article of attire that the complainant had obtained for the occasion of the wedding?

A. I think it was, yes.

Q. It was not a bill that had run very long?

A. It had run long enough that he thought it had been paid.

Q. That was shortly after they returned from the wedding journey?

A. Well, that was in the summer some time. I don't know when they returned from the wedding journey.

Q. They were married in May?

A. Yes.

Q. And you say that at that time Mr. Smith was not willing to entrust the complainant with the money to go and pay that bill, but sent you and his wife?

A. He sent us, yes.

Q. Were you aware at the time that within a month before that he had made a will in which he made the complainant a trustee without bond, for \$5000.00?

A. No, I didn't know anything about that.

Q. You didn't know about that?

A. No, I never knew about that.

Q. You say there was a strain between Mr. Smith and the complainant in their relations?

A. Yes, it appeared so.

Q. But you have no knowledge whether there was any such strain as that before her mother's death?

A. Before her mother's death?

Q. Before her mother's death?

A. I didn't know the complainant before her mother's death.

Mr. Mercer: I made no inquiries of this witness prior to the time when Bess's mother died.

Q. Now, there was a frequent calling acquaintance between the two families during the time after the complainant's mother died for the ensuing two years?

A. Yes, always, up to the time of P. B.'s death.

Q. I suppose you were not there at breakfast time often, if at all, were you?

A. I have been there at breakfast.

Q. But not usually, I suppose?

A. No, I didn't usually breakfast there.

Q. And you were on friendly relations with the complainant during all that time?

A. Yes, sir.

Q. You testified that on the morning after the engagement of Mr. Smith and the defendant occurred, the complainant and defendant drove over together to your house?

A. Yes.

Q. To inform you of it?

A. Yes.

Q. Do you know when that was?

A. No, I don't know when it was. I understood that the engagement had taken place the night before.

Q. That it had taken place the night before?

A. I understood that.

Q. Have you no way to fix the approximate time of that, at all?

A. Why, I remember that the defendant was there in February. I met her first on Washington's birthday. It must have been after that.

Q. It must have been after that?

A. That is all I know.

Q. You have no way of fixing how long after?

A. No.

Q. You testified that the defendant treated these children, the complainant's children, kindly?

A. Yes, yes, indeed.

Q. Did she show any particular love toward the children?

A. She didn't show any lack of care or affection for them, no. Yes, she petted them; she used to take them up and petted them and was very lovely with them.

Q. Did she love the children?

A. I think she did.

Q. Was she fond of them?

A. I think she was.

Q. Did she want to keep them?

A. I don't know whether she wanted to keep them—as her own, you mean?

Q. No. Did she want to keep them there in the house?

A. I don't know.

Q. You say she loved them and was fond of them?

A. Yes.

Q. Did she want them to stay?

A. I don't know whether she wanted them to stay.

Q. You don't know as to that?

A. No, I don't know anything about that.

Q. Did you hear anything about that? You heard a good deal about affairs—did you hear anything about that?

A. About what?

Q. Whether she wanted the children to stay in the house, to continue to live there?

A. No; Bess was going to take the children with her when she left.

Q. No, but before the arrangement was made for Bess to go.

A. Oh, yes; they were staying there and being taken care of at that time all the while Bess was gone.

Q. Yes; and was it the defendant's desire, do you know, that the children should stay and live in the house indefinitely?

A. I don't know.

Q. Did you hear anything about that?

A. She never told me what she desired about that.

Q. Did you hear from any source what was the defendant's wish in that regard?

Objected to as incompetent and immaterial to any issue in this case.

Mr. Hallam: There is considerable testimony on that.

Mr. Mercer: The question is whether she heard from somebody else outside of the defendant?

COURT: You may answer that question.

A. I don't know. I don't know what she wanted done.

Q. You never had any information on it?

COURT: I think you have pursued that far enough. She says she does not know, the defendant never told her anything about that. She has no intimation on the subject.

Q. Well, were you in as close association with the family as you had been formerly?

A. I was not there so often, no; the reason being—

Q. You may state the reason.

A. Why the necessity for close association with Bess was done with by that time; she had her health and spirits restored, and the circumstances were not the same.

Q. Did you say that Mr. Smith told you that Bess could not stay there in the house any longer?

A. At that conversation in the library, yes. At that conversation in the library he told me.

Q. Was that while she was away on the theatrical trip?

A. No, Bess was there.

Q. Was that before or after she went on that trip?

A. That was at the conversation when we were all together there in the library before she went away.

Q. Before she went away?

A. Yes.

Q. Mr. Smith said she could not stay?

A. Yes.

Q. Was that the reason she went on the theatrical trip?

A. I don't know why she went on the theatrical trip.

Q. She had to go somewhere because Mr. Smith would not let her stay any longer, did she?

A. I suppose so.

Q. Don't you know, as a matter of fact, that Mr. Smith objected to her going?

A. No, he didn't. He intended that she should go; wanted her to go.

Mr. Mercer: Aren't you asking a question there that the witness didn't understand?

Mr. Hallam: I want her to understand.

Q. Let me make it entirely clear if I have not. Where did Mr. Smith want her to go, or do you know?

A. We were discussing the question of her going to Chicago and trying to do something to earn her living. That is the conversation that I detailed about, when he first spoke of giving her a certain sum of money a month.

Q. Did you know that she requested Mr. Smith that she be allowed to take a little flat and her two children there in Minneapolis, and live in that way?

A. Yes, I heard something of that.

Q. You knew about that?

A. Yes, I heard something about it.

Q. Did the complainant talk that over with you?

A. Bess?

Q. Yes.

A. I don't remember whether she did or not, but I heard of it. I have an impression of hearing of it.

Q. Did you know that Mr. Smith objected to that?

A. I remember that Mrs. Price at one time wanted to take the children and go off out to White Bear and live.

Q. White Bear is a lake out near the Twin Cities?

A. Yes.

Mr. Mercer: A summer lake outside of St. Paul—in order to make the record clear.

A. She told me that she would like that herself. P. B. would not allow it.

Q. Didn't she also mention taking a flat there in Minneapolis?

A. Well, I am not clear about that, Mr. Hallam. I don't really remember specifically about that.

Q. Why didn't P. B. allow her to go and live in a flat or residence of her own with the children? Was not, in fact, the reason that he gave that she was his daughter and her place was in the home there with him?

A. Well, I would assume that she expected him, of course, to stand the expenses of it and keep it up for her in a separate home of her own; and I assume that he had reasons of his own for not wanting her to do it.

Q. Was not that the reason that was stated?

A. No, I don't think so.

Q. That he wanted her to stay home because she was his daughter?

A. No, I don't think so.

Q. What was the reason, if you know?

A. I don't know any further than I have given here.

Q. On account of the expense, do you say?

A. I suppose that was part of the reason. I don't know anything of his reason for her staying home, because I heard him say she could not stay there.

Q. Did Mr. Smith ever object to expenses in the care of complainant and her children, that you know of?

A. Why, he has reproved her for being extravagant.

Q. How is that?

A. He has reproved her for being extravagant.

Q. You say you heard a conversation—participated in a conversation, if I understood you correctly, between Mr. Smith and Bess about her going to Chicago?

A. Yes.

Q. To live?

A. Yes; well, to stay, to be there.

Q. That he would contribute \$25 a month for her support there?

A. Yes.

Q. Herself and the two children?

A. No. The children were not to go there.

Q. The children were not to go?

A. No. They were to be in the house. She was to get out and see if she could make her way.

Q. Where were the children to be?

A. Why, I don't know whether he had planned anything specially for them or not, but she was not to take them and live on \$25.00 a month.

Q. Do I understand you to say, Mrs. Smith, that Mr. Smith advised this complainant to separate from her children?

Mr. Mercer: Just a moment, now. She has not said that.

Mr. Hallam: Well, I am asking her. It seems to me the drift of it is to that effect.

COURT: What have you to say as to that?

A. That he advised her to separate from them?

Q. Yes.

A. Why, Bess was going to try to go out and try to earn her own living. There was talk of her going to Chicago to do something or try to do something. I don't know what. The discussion turned on the point of how she would get along down there until she became in a position to earn her living. Mr. Smith said he would send her \$25 or \$30 a month. I persuaded him to raise that figure. I told him that that was not enough for Bess to live on in Chicago. That she would not be able to do that until she found something.

Q. My question was, Do you understand that Mr. Smith ever advised the complainant to separate from her children?

A. Not permanently, no.

Q. Temporarily?

A. No, I don't think he ever advised her to separate from them.

Q. Did this offer of his to give her \$25 a month include temporary or otherwise, a separation from her children?

A. If she went away from home she would be separated from them for a time.

Q. How is that?

A. If she went away from home she would be separated from them for a time.

Q. But you say that there was nothing specific as to where the children were to be?

A. Well, I think, I assume that they would be there where they had been all their lives.

Q. You think that they contemplated her going to Chicago and the children remaining there with Mr. Smith and the defendant?

A. For a time, until Bess found out what she was going to settle on. I am not sure but it was previous to that that there had been some talk about her going away with her own father. There was some, at some time or other,—going away to the care of her own father with the children.

Q. Was he insisting on her going to Chicago?

A. No, not specially on her going to Chicago?

Q. Was he insisting on any other plan?

A. No, I don't think so. About any specific place that she should go, do you mean?

Q. Yes, that is what I mean.

A. No, I don't think so.

Q. But he was insisting that she must go somewhere, even if she left the children behind?

A. She was going somewhere to try to earn her living.

Q. Was he insisting on it?

A. I don't know that he insisted on her going to Chicago. In fact I know that I didn't hear him insist that she go to Chicago; but he insisted that he was entirely dissatisfied with the way she had been doing there, and that he couldn't stand it to have her stay on there, and there was always discussion as to where she and the children would go finally.

Q. Was he insisting that she go somewhere and leave the children for the time there?

A. I can't say that he was, Mr. Hallam. But when

you say he was insisting—I don't mean that. But I know that the idea was that Bess was to go out and see what she could do to earn her living, and that P. B. would take care of the children until she could anyway.

COURT: I think I understand that.

Q. Was there any prospective employment in Chicago for her?

A. I don't know what her idea was about going down. I don't think I know.

Q. What was his idea, if you know?

A. It was her idea of going to Chicago.

Q. What was Mr. Smith's idea in offering to contribute \$25 a month to her expenses?

A. His idea was that she couldn't get along on less, I suppose.

Q. What was his idea—what employment did he have in mind for her there?

A. I don't know.

Q. Did he specify anything that he knew she could do there?

A. No, I don't know about that. I don't know what his idea was.

Q. What did you hear? I am asking you what you heard said.

A. I didn't hear it said, because I don't know about it.

Q. So far as you heard the conversation, he had nothing in view for her to do after she got to Chicago, but he was going to furnish her \$25 a month to go there and shift for herself?

A. He was going to furnish her \$25 or \$30 a month

while she was away trying to find something to do. That was his idea. I thought that was not enough for her.

Q. You got him to change it how much—\$40?

A. I forget how much it was—\$40 or \$50 a month.

COURT: She never went there to Chicago?

A. I don't believe she went to Chicago.

Mr. Mercer: She went on the stage, didn't she?

A. I think she went on the stage.

Q. Well, from the whole tenor of that conversation, did you gather that Mr. Smith had any idea what the complainant was going to do after she got to Chicago?

COURT: I don't think it is necessary to pursue that any further. I understand very fully what the conversation was about. I think I understand pretty fully what Mr. Smith was doing at the time. My impression is that the plaintiff was wanting to go to Chicago, and that Mr. Smith, if she went there, was agreeable to assisting her to a certain extent, and that is about the whole thing there is to it. There is no use to examine further about that.

Mr. Mercer: Until she got started.

Mr. Hallam: I think that is all.

REDIRECT EXAMINATION.

Q. Did you have some talk with the plaintiff at one time about whether or not she had ever talked with Mr. Smith about being adopted.

A. Yes.

Q. If so, tell us what it was.

A. I had a talk with her about why P. B. didn't adopt her.

Q. Tell us when that was as near as you can.

A. I couldn't fix the time, Mr. Mercer. It was in my early acquaintance with her.

Q. It was after her mother died?

A. Yes.

Q. Now, what did she say?

A. She said that her mother hadn't wanted P. B. to adopt her, because her own father had mining interests which they hoped might develop into something worth while, and they thought he would be more favorably inclined to remember her generously if she were not the adopted child of another man.

RECROSS EXAMINATION.

Q. Did she say that Mr. Smith wanted to adopt her legally?

A. I don't know. I think the way it came up, I asked her if P. B. had ever adopted her, and she said no, that mother didn't want him to; and then, as I said, about her own father.

Q. You didn't know at that time whether P. B. had adopted her or not?

A. I think I couldn't have known, because I asked her.

Q. You asked her so you couldn't have known.

A. I couldn't have known before I asked her.

Q. Well, then, was he treating her as a daughter and as a friend both, or how about that, Mrs. Smith?

A. He was treating her as he had always treated

her. I don't remember how early this was in my acquaintance—whether I had had much opportunity.

Q. You had seen nothing prior to that time, whether he had adopted her legally?

A. I had no idea about it. I asked her to find out.

Q. You had seen nothing to lead you to think otherwise?

A. Perhaps I had. I don't remember.

Q. When was that?

A. I don't know. I think it was early in my acquaintance with Bess. I was sort of getting acquainted.

Q. You think that was early in your acquaintance?

A. I think so. I think that was before—I think it was quite early in my acquaintance.

Q. Well, now, Mrs. Smith, when you asked Bess if P. B. had ever adopted her, you considered that the relation was that of parent and child, didn't you, as you understood from what you had seen?

A. Why, I knew that Bess was P. B.'s step-daughter, of course, I knew it. I didn't know whether he ever adopted her when he married her mother, as men sometimes do when they marry a second time, and I asked her.

Q. But you considered their relation to all intents and purposes was that of parent and child when you asked that question?

A. I knew their relation, Mr. Hallam.

Excused.

GEORGE K. GIBSON

Called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Mercer:

Mr. Gibson, did you know Peter B. Smith?

A. I did.

Q. Were you associated in business in connection with the Burnham Grain Company, a subsidiary company of St. Anthony & Dakota Elevator Company, with Mr. Smith and his nephew Arthur?

A. Yes, sir.

Q. Your associations were formed there through your acquaintance with Arthur Smith and P. B.?

A. Primarily.

Q. You were transacting business there on joint account with the Burnham Grain Company for two or three years before Mr. Smith's death?

A. Yes, sir; five years.

Q. You were in constant business relations with Mr. Smith?

A. Yes, sir; daily.

Q. Lunched with him sometimes?

A. Frequently.

Q. Knew the workings of the business system under him?

A. Yes, sir.

Q. And his business associates?

A. Yes, sir.

Q. You stayed there until the time he died?

A. I was there, yes, sir, after he died.

Q. You may tell us, if you know, what sort of a man P. B. Smith was as to his tendency to repeat statements and general conversation and things of that sort?

A. Mr. Peter B. Smith was a man of decisive character. In our several companies there he was the nestor—the wise man. We always consulted him; every department consulted him; not only the Washburn-Crosby business, of which he was a director, but also the grain business; not only our own people, but he was one of those unique characters that are trusted even by his competitors, the other grain men—the Osborn and McMillan men, and the Great Western Elevator Company, and people who were buying grain out along the line in competition with him, when any problem came up, they went to Peter to talk it over.

Q. Generally speaking, he was the sort of man who listened and let other people talk?

A. Yes, sir; in all conferences by us, we would all get in and argue, and then Mr. Smith would settle it.

Q. His expressions were very brief?

A. Short and decisive.

Q. And to the point?

A. Yes, sir.

Q. He was not accustomed to repeating himself?

A. And he was not accustomed to having anybody argue with him.

Q. He was not accustomed to repeating a proposition over and over in a business way, when you saw him?

A. I never had any such experience, and I never saw anybody that did.

Q. You mean that did see him do it?

A. Yes.

Q. You are acquainted with Mr. Smith's integrity

for keeping his promises, things of that sort—reputation. Tell us all about it.

A. He was a man, Mr. Mercer, of the highest probity and honor. There never was a squarer, more honest man in Minneapolis than Mr. Smith.

Q. Technically accurate about keeping his word?

A. Yes, sir, his word was as good—better than most men's bonds.

Q. At the time he died, do you remember there was some difficulty in getting the information as to where the body was, and as to when it would be home for the funeral, and things of that sort?

A. Yes, sir; very distinctly.

Q. Tell us what it was.

A. I was on my vacation at that time up at Shell Lake, and Mrs. Jessie Carey Smith telephoned me. That is the first news I had of it. I got it along about 10 o'clock in the morning, or 11, somewhere in there, and I came down on that train; and I went at once to the offices, and learned all that I could, all they had with the wires from the east; and Mr. Bell, President of the Washburn-Crosby Company, told me that he had instructed their Boston agent—I forget his name at the moment—to go at once to the White Mountains, whatever the place was that Mr. Smith died at, and do all he could and accompany Mrs. Smith and the body home. They had heard from him, and my recollection was that he only went—that Mr. Bell was quite distressed on the second day, because he ascertained that the Boston agent had only gone part way, up as far as St. Johnsbury or Montreal or some place this side, and then had gone back,

and Mrs. Smith was coming on with the body, and we could not locate them. There was some telegraph difficulty, and we were all tremendously upset. We didn't know what arrangements to make about the funeral and principally Mr. Dunwoody and Mr. Bell were anxious and annoyed at the lack of information, because they could make no funeral arrangements. The second day I went to Mr. Bell's office, and said to Mr. Bell, "If you will give me a letter to Mr. Pennington—

Q. Mr. Pennington was president of the Soo Railroad?

A. Yes.

Mr. Hallam: Suppose you fix the date.

Mr. Mercer: He said the second day after he heard of Mr. Smith's death.

A. What was the date Mr. Smith died?

Q. He died August 16th.

A. This must have been—I came down there and got there the night of the 16th—it was the 17th; and we could not find out what train they were coming on; so it must have been about the 17th or 18th.

COURT: Do you know what time the body got home to Minneapolis?

A. Yes, I came in with the body.

COURT: What date?

A. I don't recollect exactly, Judge. It must have been three days after—I heard the 16th—that would be along about the 19th.

COURT: That would be about the 19th?

A. Or the 20th; somewhere along there.

COURT: Well, that is enough on that subject.

Mr. Mercer: Yes, I think so, too.

Q. Now, during your intimate associations with Mr. Smith, you have never heard him say anything about thinking he had any contract with the plaintiff or anything of that sort?

A. None whatever.

Q. You knew the plaintiff?

A. Yes, sir.

Q. You had been to Mr. Smith's house?

A. Yes, sir.

Q. You met her there?

A. Met Bess?

Q. Yes. You met her at the house?

A. Yes. Well, I don't know whether I met her—do you mean my first meeting?

Q. You have seen her at the house there frequently?

A. Yes, sir.

Q. You were an especial friend of Arthur Smith during those years?

A. Yes, sir.

Q. You and Arthur and Jessie Carey were frequently at P. B.'s home?

A. Yes, sir.

Q. For meals?

A. Yes, sir.

CROSS EXAMINATION.

Questions by Mr. Hallam:

Do you live here in Portland now, Mr. Gibson?

A. No, sir.

Q. Where is your present residence?

A. Grand Rapids, Wisconsin.

A. What business are you engaged in now?

A. Paper business.

Q. Did you ever hear Mr. Smith, or have any conversation with Mr. Smith concerning the complainant, Bess?

A. No, sir, no particular conversation.

Q. No particular conversation about her affairs one way or the other?

A. No; no; we may have discussed some way or another, but I have no recollection of it.

Q. Did you see them frequently during this period of your business relations, between 1900 and 1902, was it?

A. I met Mr. Smith first in 1902. That is my recollection.

Q. 1902?

A. Yes, I became acquainted with his companies in 1902.

Q. You knew him from then to his death?

A. Yes.

Q. Mr. Smith was, I understand you to say, an excellent business man?

A. Yes.

Q. He was not a man, as I take it, who would be easily put off if he had a business enterprise in view, if it was attractive to him, was he?

A. If it was what?

Q. Was he a man who was reasonably persistent in pursuing a business enterprise if it was attractive to him?

A. He stuck pretty close to business.

Q. But I mean a business enterprise that was attractive to him, was he the kind of man who would easily give it up, or was he the kind of man who would pursue it?

A. Oh, he would pursue it.

Q. In other words, to use a frequent expression, he wasn't a quitter, was he?

A. No, sir.

Q. It was through Mr. Smith's relations that you became connected with his company, was it?

A. Yes, his company, he and his nephew.

Q. Arthur? Yes.

A. Arthur.

Q. If I understood you correctly, you came down to Minneapolis on the very day of Mr. Smith's death?

A. As soon as I heard it, I took the first train to Minneapolis.

Q. But your recollection is that was the day of his death?

A. The day of his death.

Q. Whom did you get the wire from?

A. Mrs. Smith—Jessie Carey Smith. I got no wire—I got a telephone message.

Q. Oh, you got no wire. You got a telephone message. But the wires came through to Minneapolis on that day, from where he died?

A. Yes, they had heard—of course they had heard that he had died, and they let me know. How they got it, I presume was by wire.

Q. Must have come by wire?

A. Yes.

RE-DIRECT EXAMINATION.

Q. The grain men there at that time had private wires running between Minneapolis and Chicago, and then private connections from Chicago East, hadn't they?

A. Yes, we all had private wires.

Q. And those were in constant use, and from such wires as that gossip comes of the death of prominent grain men, doesn't it?

Q. Well, we used the Lewis wire, my remembrance is.

Q. And that was a private wire?

A. That was a private wire.

Q. You think information came over the Lewis wire?

A. I don't know how it came, Mr. Mercer.

Q. But you used it?

A. Yes, we made use of the Soo's private wire, that is, the dispatcher's wire. We cleared the line in order to ascertain.

Q. Now, you just happened to be in Portland on your way to the World's Fair, didn't you, or where are you going?

A. No. I am on a business trip out here. I was here a month ago, and just got home, and my company sent me right back. I am back making the Coast towns.

RECROSS EXAMINATION.

Q. You don't know over what line this wire did come to Minneapolis?

A. No, sir, I don't know.

Q. But the telegraph offices were all receiving messages, weren't they, at that time, as far as you know?

A. I don't remember, Mr. Hallam. There was trouble along about that time. The reason I fixed that was because I had to go in extremity to the Soo general offices and get Mr. Pennington's authority to clear the line in order to get a wire through to the Soo agent at the Soo crossing, and hold Mrs. Smith, and we held a conference, Mrs. Smith at one end of the wire and Mr. Bell at the other end. We would get her message from there to him, and we would repeat from the dispatcher's office through Mr. Bell, and Mr. Bell sent his messages to Mrs. Smith at the Soo. We put them through after clearing the wire. Mrs. Smith came on ahead, and the body had been lost back in Montreal or somewhere, and we had Mrs. Smith stay until we located the body down east, and then come along, when we found what train it was on, Mrs. Smith and the body came on; and I went out to Rhinelander that night, and we held the two trains there until we ascertained that Mr. Smith's body was on the train, and then we came on west.

Q. Did you meet Mrs. Smith at Chicago?

A. No, sir.

Mr. Mercer: Rhinelander. That is on the Soo.

COURT: I think we are taking up too much time on this one proposition. It doesn't have very much bearing on the case—simply to explain the delay in send-

ing the telegram west to the plaintiff. That is my understanding of it.

Mr. Mercer: That is all I put the witness on, on that point.

Q. Did you understand that the delay was in sending messages generally speaking, or in receiving them, or was it in the sending of them after they were received?

A. There was some trouble—there was telegraphic trouble I know, because we had to take drastic measures to get in connection with Mrs. Smith.

Q. Were the delays, generally speaking, through that strike?

A. My recollection is there was.

Q. Were the delays in sending or receiving?

A. There would be both.

REDIRECT EXAMINATION.

Q. I want to ask the witness one question to connect up another thing, which I will put on with another witness. This Mr. James S. Bell was the manager of the Washburn-Crosby Company, and the Washburn-Crosby Company and St. Anthony & Dakota, and what were known as the Dunwoody line of offices were all associated together?

A. Yes, sir, Mr. Bell was the president of the Washburn.

Q. Mr. Smith was the manager of the St. Anthony & Dakota, and Mr. Bell, in the actual practice, was a sort of superior officer in the general line of companies?

A. Yes, sir.

Q. Mr. Bell died recently, or some time back, didn't he?

A. Yes, in February.

Q. After a stroke of paralysis a couple of years ago.

A. Yes, sir.

Excused.

MISS NANCY BATES,

Called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Mercer:

Miss Bates, you live in Washington or Oregon?

A. Washington.

Q. On a ranch.

A. Yes, sir.

Q. Did you formerly live in Fargo, North Dakota, when Mr. Smith lived there?

A. I did.

Q. The defendant lived in Fargo at the time that Mr. Smith and his first wife lived there?

A. Yes.

Q. To your knowledge they were friends then?

A. Yes.

Q. At the time when Mrs. Grahame came down to St. Paul—I mean at the time Mrs. Grahame was in St. Paul, which has been described here—

A. Yes.

Q. When she went over to Minneapolis to a luncheon, to meet Mr. Smith and Bess, and Mrs. Grahame's brother, was Mrs. Grahame your guest in St. Paul?

A. She was.

Q. For some weeks at that time.

A. Yes.

Q. She and her mother were old friends of the Smith family?

A. Yes.

Q. Before that time?

A. Yes.

Q. You were a guest in the Smith home immediately following the death of Mr. Smith and the return to Minneapolis of Mrs. Smith?

A. Yes, I was.

Q. You remained there for some time immediately following that?

A. Yes.

Q. With Mrs. Smith. You were there at the time that Mr. Price and Mrs. Price were there, immediately following the funeral?

A. Yes, I was. I was there when they arrived.

Q. And you stayed there till they left?

A. Yes, I did.

Q. Did you hear any discussion at all, or any talk at all between Mrs. Smith and the plaintiff about any property matters, or will, or anything of that sort, during any of the time they were there, yourself?

A. No, I did not.

Q. Did you see any attempts on the part of the plaintiff to get conversations with Mrs. Smith, which were repulsed in any way?

A. No.

Q. How did Mrs. Smith treat the Prices while they

were there, as appeared to you as a guest there in the home?

A. As she treated her other guests, very cordially.
Excused.

MRS. MARIE DEWEY WALLACE,

Called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Mercer:

You are the defendant in this case, Mrs. Wallace?

A. I am.

Q. And you are the same party that was sued under the name of Marie Dewey Smith by the same plaintiff in the Hennepin County Court at Minneapolis?

A. Yes.

Q. That suit was not brought until after the probate proceedings were all closed up?

A. No, it was not.

Q. During the time you lived in Fargo, you and your mother were friends of the Smith family?

A. Yes.

Q. Do you know Miss Bates?

A. Yes.

Q. You were visiting her in St. Paul at the time you were invited over to lunch, when Mr. Smith and Bess and your brother went to lunch?

A. I visited her immediately, the day after we arrived at St. Paul, but I was not visiting her just at that moment. I visited her that day, that night.

Q. You stayed there for some little time after that?

A. Yes, about three weeks.

Q. At the time that you became engaged to Mr. Smith you may state whether or not that engagement took place at the Smith home.

A. Yes, it did.

Q. Who was there at that time?

A. Well, there was no one at the house at the time. Smith and I were there alone. I was asked over for the week end, as I believe, to the Smith house. Either Bess or Mr. Smith asked me, I have forgotten which, but Bess and Jane Clarke, who was spending the evening with her, were invited out to dinner. They left shortly before dinner; and we had dinner, and in the course of the evening Mr. Smith asked me to marry him.

Q. Now, that is Jane Clarke who was on the stand here this morning?

A. Yes.

Q. Do you remember that she and Bess returned later in the evening, and that you all three slept in the same room?

A. Yes.

Q. Do you remember telling them about the engagement when you were all three in the same room?

A. I remember telling Jane, I remember telling Bessie about it.

Q. Yes, that is what I mean.

A. Yes, I remember telling Bessie about it.

Q. Did you take her on your arms or in your arms, or anything of that sort, if you remember?

A. I rather think that Bess came into bed with me

that night; and I think we had our little talk then, and I told her about it.

Q. Was there anything said about any property matters?

A. Nothing at all.

Q. Or anything said about your not coming between her and Mr. Smith?

A. Nothing; nothing at all.

Q. Up to that time had there been anything said about any claim on the part of Bess that Mr. Smith was her father, or anything of that sort?

A. Not that I know of.

Q. Do you remember having a talk with Mr. Smith about the time of the engagement with respect to what property he had, and with respect to whether or not he expected Bess to continue with the boys to live with him? Do you remember such a conversation?

A. Yes, I do.

Q. Now, when was that?

A. That conversation was the next night. I must have stayed over the next day at Mr. Smith's house, for I remember that.

Q. That was the night after?

A. It was the night after the engagement.

Q. And the night after the morning when Bess says she had a conversation with Mr. Smith?

A. Yes.

Q. Now, what did Mr. Smith say in that conversation about that matter?

A. We took a short walk around the block, and it was the first time that Mr. Smith had ever broached the

subject of any financial nature at all; and he said then, "Dewey I am not a rich man." He said, "I had at one time quite a property and lost it, and I have accumulated now about \$40,000; but," he said, "I am getting a good salary, and my future is very bright. And Bessie is an attractive girl, and in all course of events she will marry, and she is fond of her children, and she will want her children with her, and will be away, and I shall be alone; and I have known you for many years, and I want you to come to my home." And then he went on to speak about the property, and he said, "I hope and expect that I have started now, that my property will accumulate very rapidly, and that we will have all we want to go on with." And that is about all the conversation we had. I don't remember anything else that was said.

Q. He didn't say anything about ever having made any agreement with the plaintiff here to give her his property?

A. Nothing whatever. I never heard of it.

Q. Did you ever hear of any such thing until—that any such thing was claimed even—until the suit was brought against you the first time?

A. I heard nothing of it. I never knew that such a contract could ever be made between people. It was as much of a surprise to me as a bolt out of a clear sky when that was—

Q. What was the next time that Mr. Smith said anything to you about property in any way?

A. The next time?

Q. Did he at any time before the matter of the will came up?

A. The matter of what will?

Q. Of the will at Fargo, after you were married.

A. Oh, no. There was never anything said about the property after that at that time.

Q. Now, did you know that he was making a will at the 14th of May, until after it was made?

A. No, I didn't. I knew nothing about it.

Q. You were married on the 14th of May?

A. Yes.

Q. 1902?

A. Yes.

Q. After the marriage did he call your attention to the fact—I mean some time after, that he had after the ceremony made a will?

A. Yes.

Q. What did he say about it?

A. We were married about noon and leaving on the three or four o'clock train on the Great Northern. Passing through the hall, it was in the lower hall, he said, "Dewey, here is a copy of my will, which you had better keep among your possessions." I took it, and I don't remember when I even looked at it. He said nothing more about the will. I took it as a matter of course that that was his will.

Q. Did you know where he left the original at that time?

A. No, I don't think he ever told me where he left the original.

Q. Did you know that he had made a subsequent will to that will of May 14, 1902?

A. No, I did not.

Q. Until after he was dead?

A. No, did not.

Q. He never told you that he had changed his will in any way?

A. No, he never did.

Q. Nor that he had made any new will?

A. No, he never did.

Q. When and under what circumstances did you learn of the will that was finally probated? Tell the court how it came about.

A. I think Mr. Bell telephoned me that it was time to look into business matters, and I better come down to the office and see about the will being probated.

Q. That is Mr. James S. Bell, of the Washburn-Crosby Company?

A. Mr. James S. Bell, of the Washburn-Crosby Company.

Q. He was the gentleman that Mr. Gibson said was a sort of superior officer?

A. Yes.

Q. Did you go down to Mr. Bell's office?

A. Yes, I went down to Mr. Bell's office.

Q. Now, the St. Anthony & Dakota Elevator Company offices are right on the same floor as the Washburn-Chosby, and they adjoin?

A. Yes.

Q. And their executive offices adjoined each other?

A. Yes.

Q. When you went there, tell the court what happened.

A. We went into Mr. Bell's office, and he sent for

some man to get Mr. Smith's private papers from the vault. And he brought in a tin box, about that square.

A. About two feet?

A. Yes, about two feet square. And he said, "You knew that Mr. Smith had a will?" And I said, "Yes." And he said, whether he said a later will or not. And I said I knew about the will. He picked up the will and handed it to me, and I glanced over it, and I says, "This is not the copy of the will that I have seen." "Well," he said, "This is his last will." And I said, "No, he has made no will." He said, "Yes, Mrs. Smith, he has made a will." I heard in the office that he had made a new will." And he handed it to me and I read it. And that was the first time that I had ever known of a new will being made or had heard of a will being made. I had always supposed that the copy of the will at the time of our marriage, that that will made at the time of our marriage was the one and only will that he ever made.

Q. Now, after that conversation you brought that will to our office, that is the offices of Wilson & Mercer?

A. Yes, Mr. Bell—

Q. For probating?

A. Yes.

Q. And you went to Gen'l Wilson to do that work principally?

A. Yes.

Q. And he carried on the active probaton of that estate for you?

A. Yes.

Q. During the probaton of that estate, did you in any way receive any intimation from anybody that it

was claimed that Mr. Smith had made any other will, or any agreement to make any other will?

A. None whatever.

COURT: Did you have any agreement whatsoever with Mr. Smith prior to your marriage with him in relation to property rights?

A. None whatever.

COURT: There was no ante-nuptial agreement either orally or in writing?

A. None whatever. I didn't think of such things, or even a verbal agreement. There was none whatever.

Recess until 2 P. M.

Portland, Oregon, June 1915. 2 P. M.

MRS. MARIE DEWEY WALLACE resumes the stand.

DIRECT EXAMINATION.

(Continued.)

Q. Did you ever have any agreement, either oral or written, with Mr. Smith, with respect to what should be done with his property?

A. None whatever.

COURT: Did you have any estate of your own, Mrs. Wallace, before you married Mr. Smith?

A. No, I had not.

Q. So that there never was any talk between you and Mr. Smith as to your giving any property which he would leave you to the plaintiff?

A. I never heard of such a thing.

Q. Or for the children?

A. No, I never heard of such a thing. It was never mentioned.

Q. The first you ever heard that there was any claim of that kind was when the suit was brought in Minnesota?

A. Yes. That was the first time I had ever heard of it, of such a thing at all.

Q. And since that time you have been searching to see if you could find anything about it; and outside of these pleadings you have not found anybody that says anything of the kind, except what the plaintiff said here on the stand, have you?

A. No; never have I heard of any possible way or any possible word to give me an idea that such a thing ever happened, because it never did with me, or that there was ever such a contract or understanding or the least intimation that there was such an understanding.

Mr. Hallam: I move that the answer be stricken out as not responsive and argumentative.

Mr. Mercer: If you want to strike out the answer I will simply have to ask some more questions to bring out the same thing.

COURT: I will overrule the motion.

Q. Do you remember the occasion when the plaintiff and her husband came to the house after the funeral?

A. Yes.

Q. Do you remember they stayed there for a week or two?

Q. Yes.

Q. Do you remember the time when they went out to visit the Barnes?

A. I remember that they went away from my house, yes.

Q. They went away?

A. Yes.

Q. You didn't know exactly where they went?

A. No, not until later.

Q. Tell us what the fact is as to whether you furnished them money before they went away the first time.

A. Yes, I did.

Q. How much?

A. \$100.00.

Q. And for what purpose, do you remember?

A. I suppose that it was towards tickets back to San Francisco.

Q. California?

A. Yes.

Q. After they had been gone several days they came back to the house again?

A. Yes.

Q. And you again furnished them money?

A. Yes.

Q. How much?

A. I think it was \$160.00.

Q. After they had been in Chicago, or been away for some days, you understood they had gone back to California, didn't you?

A. Yes.

Q. And you got the letter which has been introduced in evidence here from Chicago from them?

A. Yes.

Q. You sent Jessie Carey Smith down there to see whether or not they were sick?

A. Yes.

Q. And furnished her the money again for their trip?

A. Yes.

Q. Now, did you bring up the question of any will with them after Mr. Smith's death, or did they bring it up to you?

A. They brought it up to me.

Q. Did you have a conversation with the plaintiff?

A. Yes.

Q. About the will?

A. Yes.

Q. Did you make any attempt to avoid her about any conversation at any time about that?

A. None whatever; not whatever.

Q. Did you have a conversation on the porch at the time when she mentions?

A. Yes.

Q. Did you in that conversation say anything to the effect that you understood there was an agreement between her and Mr. Smith?

A. No.

Q. Or between you and Mr. Smith on her account?

A. No.

Q. Was that matter mentioned?

A. No.

Q. Did you in that conversation suggest that it was time for them to go home, or anything of that sort?

A. No.

Q. Did the matter of their coming home come up in the conversation?

A. About their going home, you mean?

Q. Yes. Did she mention their going home?

A. Yes.

Q. Was the matter mentioned in that conversation about the fact that this note had been left for them?

A. Yes.

Q. In that conversation was there anything said by either of you to the effect that you would probate the estate and send them their interest?

A. No, nothing.

Q. Did you understand at that time that they had any interest?

A. No, I didn't understand they had.

Q. Outside of this \$2000 note?

A. None whatever.

Q. Was there any claim made by the plaintiff to you at that time that they had any interest?

A. No, there was no claim.

Q. You did tell the plaintiff that you were surprised when you found this new will had been made, didn't you?

A. Yes, I did.

Q. And you were surprised?

A. Yes, I was.

Mr. Hallam: I suggest you do not ask these leading questions.

Mr. Mercer: I understood she testified to that. I

understood her to say Mrs. Smith said she was surprised to find this will.

COURT: She said that at the time the will was shown her the first time.

Mr. Mercer: This is the only time they talked about this will, as I understand.

COURT: I understand you are asking about the conversations which took place between her and the plaintiff on the porch.

Mr. Mercer: I am. I understood her to say that Mrs. Wallace said to her in that conversation on the porch that she was surprised to find this will.

Mr. Hallam: No, Mr. Mercer, she has not so testified.

Mr. Mercer: I think if you will read her cross-examination you will find she did.

A. Mr. Mercer, do you mean to ask me did I say I was surprised at the second will, surprised about the second will that had been made?

Q. Yes, I am asking you if you were in fact surprised to find there had been a second will made.

A. Yes, yes.

COURT: That conversation was with Mr. Bell, wasn't it?

A. Well, that conversation was with Mr. Bell, and as I remember I told Bess that I was surprised at the contents of his last will, Mr. Smith's last will.

Q. In fact, you didn't know, I think you said this morning, that this second will had been made at all.

A. No.

Q. Until after Mr. Smith's death, when you found it in Mr. Bell's possession.

A. I knew nothing of it at all.

Q. After the plaintiff went back, away, from Chicago to California, or wherever she went, did you receive any communications from her?

A. None whatever.

Q. Or from Mr. Price?

A. None whatever.

Q. You did know of Jessie Carey Smith receiving a letter from Mr. Price at one time, didn't you, to the effect that he could not pay the note?

A. Oh, yes; yes.

Q. But that didn't come to you directly?

A. No.

Q. And was there anything in that respecting the—I believe I have got that letter somewhere, if I can get it. I am sure I can. (Letter marked "Defendant's Exhibit 8"). I show you defendant's exhibit 8 and ask you if that is the letter to which you refer.

A. Yes.

Q. Is Exhibit 8 the only letter that you ever knew of coming from either Mr. or Mrs. Price, either to you or Jessie Carey Smith, after they went back to California?

A. Yes, it was the only letter that I ever knew of.

Mr. Mercer: I will offer Exhibit 8 in evidence.

COURT: Was that written by Mr. Price?

Mr. Mercer: Written by Mr. Price. Signed "Ned," isn't it?

Mr. Hallam: Signed "E. J. Price."

Mr. Mercer: To Jessie Carey Smith.

Mr. Hallam: Objected to as incompetent, irrelevant and immaterial, particularly as it is not the letter of the complainant nor written to the defendant, and it is immaterial. It is not apparent to what it refers or how it relates to the case.

Mr. Mercer: It is true it is written from E. J. Price to Friend Jess.

COURT: Concerning what?

Mr. Mercer: It is concerning the payment of the note, which was given while they were in Chicago.

COURT: I will admit it.

Mr. Hallam: I don't think it mentions any note.

Mr. Mercer: Excuse me.

Mr. Hallam: Perhaps it does. I read it.

Mr. Mercer: Maybe I am mistaken about that. I thought it did. It don't say note. It says "your matter." But it is written on November 1st, after the note was given in September, 60 day note.

COURT: I will overrule the objection. Let it go in.

Mr. Mercer: It is not very material, except he says, —that goes on to tell in a friendly way—I guess I will read it. It is short.

COURT: Very well.

Mr. Mercer (Reading): "Yours of the 1st received last week. Would have answered sooner but have had lots to do. Bess has not been well since we returned and two weeks she was taken very ill, have had the doctor once or twice a day since, also a nurse, she was a little better yesterday so I let the nurse go. For three nights last week I did not have my clothes off, and to add to the

situation on Friday both boys were taken with the chicken-pox, of course they are not seriously ill, but they are a lot of trouble. I will be unable to attend to the matter you wrote about for the present, and cannot tell just how soon. Business here and in fact all over the Coast is very bad, the worst in years. The outlook is also bad until summer. I will attend to your matter as soon as possible, but for the present I am very sorry, but it is impossible. Yours respectfully, E. J. Price."

COURT: That is written to Jessie Carey Smith?

Mr. Mercer: Jessie Carey Smith, yes. And the note was given in the name of Jessie Carey Smith on this.

Q. Aside from that letter from Mr. Price, did you hear anything from them, either him or Mrs. Price, either directly or indirectly, until they sued you?

A. No, I heard nothing from either of them.

Q. And have you to this day had any communication from either of them?

A. No.

Q. Or any conversation with either of them since they left here?

A. No, none whatever.

Q. I mean since they left Minneapolis.

A. Yes.

Q. Did the plaintiff let you know when she returned to Minneapolis?

A. No, she did not.

Q. Was the first that you knew that she was back in Minneapolis when she started the suit against you?

A. Yes, when I had this summons and complaint.

Q. Summons and complaint in the state court?

A. Summons and complaint brought to my house.

Q. You were present at the time of the conversation that Mr. Lauderdale gives?

A. Yes.

Q. In the house?

A. Yes.

Q. Was that conversation in any way prompted by anything you said to Mr. Smith?

A. No, never; not at all.

Q. You were present at the conversation as given by Jessie Carey Smith in the home there, when they were talking about Bess leaving and earning her own living?

A. Yes, I was present.

Q. You heard that conversation related?

A. Yes, sir.

Q. Did you take any part in that?

A. No.

Q. Except what she said there, I mean.

A. Except that one little remark which I made.

Q. Well, now, what did you say there?

A. I think I said just about as Mrs. Smith did. That when P. B. said "Dewey, I wish you would take these jewels and take care of them," I said, "No, P. B., they are not for me to take. Some time when Bessie feels that she can take care of them herself they are for her, and you had better put them in your safe. I don't want to take them."

Q. And you didn't take them?

A. No.

Q. Do you remember the time when you went with Jessie Carey Smith to pay the dressmaker's bill soon after you came back?

A. Yes.

Q. When you came into the home of Peter B. Smith did he make you an allowance for your personal expenses soon after you came?

A. Yes.

Q. How much?

A. \$50.00 a month.

Q. And at that time Bess was living in the home?

A. Yes.

Q. Tell the court the fact about whether or not you discovered there were some back bills that were turning up at that time, and whether or not you did anything about it before you let Mr. Smith know?

A. The first bills I ever knew anything about were brought to me by the maid, Emily, a few days after our marriage, one morning when P. B. and little Donald and I were at breakfast together. That is the first time I knew about them. They were household bills.

Q. Household bills?

A. Household bills.

Q. What did you do with respect to paying bills out of your allowance?

A. I went on as well as I could and paid a number of bills which I ought not to have to, which I should not have paid.

Q. The bills had been contracted before you came there?

A. Yes.

Q. Out of this \$50 a month that you got for yourself?

A. Yes.

Q. Why did you do that, Mrs. Wallace?

A. Well, because we had had one scene at the breakfast table in regard to these bills which had accumulated on our wedding trip, and I naturally wanted no more scenes. And I thought possibly that things would straighten themselves out, but finally I found that they were accumulating a little bit too fast. In fact, Bess would come to me for money; not very much; but my allowance was \$50, and I was getting personal things for myself, and I found that I was going to get very much behind. It was a matter of annoyance and worry to me, more especially worry because I didn't want to go on that way. And finally Arthur Smith was over at the house one night; we were on the porch, and I told him.

Mr. Hallam: I object to this as not responsive to the question.

Mr. Mercer: I asked her to tell how it came about.

A. This is how it came about. Arthur said, "Dewey, you are doing a very great wrong about this in trying to protect Bess." He said, "The only thing for you to do is to get these bills and have it out with P. B."

Mr. Hallam: If I understood—I don't understand this was in the presence of either Mr. Smith or the complainant.

A. No.

COURT: This is a conversation you had with Arthur?

A. This was a conversation I had with Arthur Smith.

Q. Was the plaintiff or Mr. Smith there at the time?

A. No, the plaintiff was not there at the time.

Q. The plaintiff was not there?

A. No.

Q. Was Mr. Smith there?

A. No.

Mr. Mercer: I simply want to show enough of it to show that Arthur Smith told her to go to P. B. after she had explained to him what the situation was.

COURT: That is the fact is it, that he told you to go to P. B.?

A. Yes.

Q. Now, go on and tell what happened.

A. I think that all blew over; and that is about all.

Q. You mean at that particular time?

A. At that particular time, yes. That was the only time when I was using my allowance.

Q. You quit using your allowance for that purpose?

A. Yes.

Q. You said you had one scene after you returned, at the breakfast table. What did you mean by that?

A. Emily brought some bills in to me, some grocery and meat bills of some kind, or there were some bills that had not been paid and had been left at the house. Any way, she brought them in to me and laid them at my plate. Some question arose as to what the bills were,

and I passed them over to P. B. And then I think he sent for Bess to come down-stairs.

COURT: He did what?

A. He sent for Bess to come down-stairs to the dining room where we were. It was the first really stormy scene I ever witnessed in my life between them.

Q. You had nothing further to do with them after you passed over those bills to Mr. Smith?

A. No.

COURT: Did you hear what was said?

A. Yes, I was there.

Q. Tell us.

A. I don't exactly remember what was said.

Q. Do you remember whether there was anything said as to whether or not money had been furnished already to pay the bills?

A. Yes, I know that.

Q. Who said that?

A. P. B. said that. It was his habit to furnish money for the bills, before the 10th.

Q. He paid his household bills promptly, didn't he?

A. Well, yes; always; all his bills. He was very particular about his bills being paid before the 10th of every month, very punctilious about it.

Q. Now, Mrs. Wallace, you were present at the time when you and Jessie Carey went down to see about the dressmaker's bill and pay it?

A. Yes.

Q. You went with Jessie Carey down for that purpose?

A. Yes.

Q. There came a time when Bess talked of going away somewhere to earn her own living, and that was when this other conversation came up, wasn't it?

A. What other conversation?

Q. The one that Jessie Carey tells about in respect to the jewelry and pawning stuff.

A. Yes.

Q. Now, she didn't go to Chicago at that time to work?

A. No.

Q. Then the question of her going on the stage arose?

A. Yes.

Q. Do you know how that happened to come about?

A. Not very clearly. I think there was a friend of hers, Maude Marshall, who had been on the stage, and she had gotten the idea that she would like to go on the stage too, and was very anxious to go.

Q. Did you go about with her after she made up her mind that she wanted to go on the stage?

A. Yes.

Q. To see if she could get a position?

A. Yes; Bess asked me to go.

Q. Tell us where you went and what you did.

A. Bess asked me to go with her one afternoon to see a man at the Bijou theatre, I believe. It was a stock company theatre. She said she didn't wish to go alone and wished me to go with her. So we drove down there and had a talk with this man, and as I remember he had nothing for her. Then in some way she had an idea that there was a company in St. Paul, if she could see the

management there. So P. B. asked me if I would go over with her. She had made an appointment then, or was to have made an appointment to see them before the evening performance in St. Paul. And Mr. Smith said that if we would go over he would come for us during the performance and meet us in the foyer at the beginning of the performance. So we went over. We went back of the stage, and Bessie had a little talk with these men who were on the stage. They were, I rather imagine, actor-managers, because, as I remember, they were partly dressed in their character costume then. And they discouraged her in that respect. They had nothing for her then. So we met Mr. Smith in front of the theatre and we all went in together.

Q. Did you have any conversation after that in the theatre?

A. Yes, we did.

Q. Tell what that was.

A. We sat up near the front of the stage, and Mr. Smith sat next—Mr. Smith and Bessie next to me. And after the curtain went up I looked at P. B. and the tears were running down his cheeks. And I said, "Bess, how can you do it?" And she shrugged her shoulders and tossed her head, and said, "Look here, Dewey, I am going anyway." That was the only conversation we had. We went home when the theatre was over.

Q. Now, there came a time when she went on the stage and was gone for a number of months?

A. Yes, very shortly.

Q. During that time the children were left under your care?

A. Yes.

Q. And while the children were there after you came into the home they had a nurse, or different nurses?

A. Yes; they had a number of different nurses.

Q. Who attended to hiring and discharging those nurses?

A. There was a nurse in the home when I first went there. She was discharged and Bessie hired another, and I remember of hiring one myself, and Bess was away at the time and Bobbie was being weaned from his bottle and was teething not so well. And I didn't know anything about babies myself; and the nurse was not a good nurse; she was not a girl whom I could depend upon. And the last nurse that we had, who was an excellent nurse, Emily, the cook, got for me herself.

Q. Now, you have no children yourself?

A. No.

Q. Had no children. Jessie Carey Smith had two babies?

A. Yes.

Q. And they were a little older than the two boys that have been described here?

A. Yes.

Q. And you had had no particular experience with children yourself?

A. No, I hadn't.

Q. Now, there came a time after these various mat-

ters when the question arose as to what to do with Bess, didn't there?

A. Yes.

Q. On Mr. Smith's part. I show you this envelope marked Defendant's Exhibit 7, attached to the Minneapolis depositions.

A. Yes.

Q. And the letter marked Defendant's Exhibit 8, attached to the Minneapolis depositions, each of them marked "copy," and ask you if those are in your handwriting.

A. Yes, it is.

Q. I will ask you how you happened to write those.

COURT: To whom is that addressed? To whom is that letter addressed?

Mr. Mercer: The letter is addressed to E. A. Wright, Esq., Canton, Ohio. There is other memoranda on it besides that. For instance, on the envelope, it says, "copy of letter from P. B. Smith to E. A. Wright, Esq., Canton, Ohio, re proposition for maintenance of Bess and children." Now how did you happen to write that document?

A. It was at a time when Mr. Smith was about at his wits' end to know what to do about Bess and what to do with her. And he wanted and hoped that Mr. and Mrs. Wright—Mrs. Wright was called Aunt Anna—Bess' Aunt Anna would take Bess and the children, and he wrote this letter; and one morning before he left the house he gave it to me and said, "Dewey, I wish you would make a copy of this letter for me and file it away among some of Bess's bills." I had a cubby-hole in the

desk up in the den in which he had asked me to keep all of her receipted bills that he had paid, or that he had had me pay or had had Mrs. Jessie Carey Smith pay, bills that had come in. And so he said, "Put that away with the rest of Bess's bills." This letter was in his own hand-writing.

COURT: That is, the original?

A. The original, yes. I copied it. I went into the den some time that day, copied it and slipped it in the cubby-hole with these other letters and bills.

Q. That letter has been in our possession from the time that first action was brought. I think it was never returned to you, was it?

A. I gave you that letter when this first action was brought.

Q. You copied that letter so as to make this a copy of what Mr. Smith had written?

A. What is it?

Q. I say this is a copy of what Mr. Smith had written?

A. Yes.

Q. I think I have a typewritten copy of that that we can read faster. It was Mr. Smith who signed his own name to that original letter?

A. Yes, his letter was signed.

Mr. Mercer: Now, I will offer in evidence the letter and the envelope separately. They are marked Exhibits 7 and 8 to the deposition, and they are the letters which I inquired of Mrs. Wright.

COURT: Any objection to that?

Mr. Hallam: I object to it, your Honor, on the

ground that it is not properly authenticated, in this, that the deposition of Mrs. Wright, which was read to your Honor yesterday, is to the effect that while her memory is vague, the account that she gave of her recollection of that letter, it is true at another time she said it is pretty hard to tell whether that is a copy when Mr. Mercer asked her to give her recollection of what that letter was, and its contents, it was rather different from the scope of this letter. Her recollection was, as she stated it, that P. B. wanted to place the children with them because the defendant didn't want them around. I think that was the language of Mrs. Wright's remark, as your witness in your deposition. And in that view conflicting testimony, at least in some degree, between their own witnesses as to whether this is an authentic copy, it seems to me it is not properly authenticated.

Mr. Mercer: Your Honor will remember that in that deposition Mrs. Wright stated that there were a number of letters received; that she and one other member of the family got out all of the stuff and tore it up or burned it up, and she didn't know where they were. She didn't remember that this particular letter was the letter she saw, but she knew this subject was up, and she thought there was more than one letter. But the point to our testimony was to show that all the letters that had come to him in his possession had been destroyed.

Mr. Hallam: If the court please, I don't recollect. Mr. Mercer may be correct in that, but I don't recall that she mentioned but one letter relating to that subject. Perhaps she does.

COURT: There was a disagreement between her

recollection of what the letter was and the letter produced. I think it would be proper to let the witness identify that letter, and offer it in evidence as being an exact copy of that written by Mr. Smith. I think that would be proper. If you want to save an exception you may.

Mr. Hallam: Yes, I will save an exception.

Q. I understood you to say this was signed by Mr. Smith and was a copy of the letter that was sent through the mails.

A. Yes.

COURT: Have you read that letter, Mrs. Wallace?

A. This one?

COURT: Yes.

A. Lately?

COURT: Yes.

A. I have not read it this week.

COURT: Hand her the letter and ask her if that is a copy of the letter Mr. Smith asked her to make.

A. Yes, I remember this letter real well.

COURT: You are sure that is a copy of the letter that Mr. Smith asked you to make?

A. Yes, I am sure. This is in my handwriting.

COURT: You may introduce the letter.

|(Letter read.)

Q. Now, it was after this letter was written that Bess and the children went West?

A. Yes.

Q. Did her father come to the house with respect to

arranging where she should go about that time?

A. Yes, he did.

Q. You saw him?

A. Yes.

Q. That is Mr. Ailes?

A. Yes, Mr. Ailes.

Q. And had a talk with Mr. Smith?

A. Yes.

Q. Did you hear all that conversation?

A. Yes, practically all the conversation.

Q. What was the gist of it?

COURT: At what time was that now?

A. It was after this, after Mr. and Mrs. Wright had written P. B. that they could not take Bess and the children. And he communicated then with Bess' father and asked him to come to the house, to find out if he would help, suggest something.

Q. Now, tell us what conversation you heard there between Mr. Smith and Bess' father at that time.

A. Well, P. B. told Mr. Ailes practically about what he has written to Mrs. Wright, and then said that he wanted, that he hoped Mr. Ailes would help him solve the solution of what to do with Bess and the children. And Mr. Ailes then said, or they agreed together, Mr. Ailes would give \$50 toward her support and P. B. would give \$50 toward her support. Mr. Ailes then suggested that Bess go to Tacoma. He either had a relative or very close friends in a Dr. and Mrs. Miller, and I believe he communicated with them and found that they would be willing to take Bess to board at their home.

Q. Was that the reason why they went up to Tacoma at that time?

A. Yes.

Q. Because her father suggested their going there?

A. Yes.

COURT: Was that the whole of the conversation now?

A. Was that all the conversation?

COURT: Have you stated all the conversation?

A. As far as I can remember. He was not there very long.

Q. Now, after that time you know of their being down in Southern California?

A. Yes.

COURT: In southern California?

Mr. Mercer: I mean in California. Excuse me. Mill Valley. I got that into my head, that was Southern California.

A. Yes, in Mill Valley.

Q. You knew of their being in Mill Valley?

A. Yes.

Q. You and Mr. Smith at one time stopped off there to see them?

A. Yes, sir.

Q. Where had you been?

A. We had been in Southern California.

Q. And you stopped at the Prices?

A. No.

Q. Or was that before the Prices were married?

A. That was before they were married: before Bess had married. She was then living in Mill Valley. We

stopped in San Francisco, and went over to Mill Valley, and P. B. saw the children and Bess there.

Q. And how long did you stay there at the house?

A. At their house?

Q. Yes.

A. I think P. B. was over there one afternoon, and I was ill and not able to go over the first afternoon that we arrived in San Francisco; and he expected to stay the afternoon and evening. But he left in the morning and came back about 4 o'clock that afternoon. And he said he would go over the next day if I was well enough. And I think that the next day when we went over P. B. brought Bess and the two children over to our hotel and took a room next to ours, and they were there all the time we were in San Francisco, about a week.

Q. After that were you in California after she had married Mr. Price?

A. Yes, one visit.

Q. You met Mr. Price there?

A. Yes.

Q. And you were on your way then, on another trip?

A. We were just back from a trip to Japan and China. It was about six weeks after the earthquake.

Q. At that time you stopped and saw the children again?

A. We went over there and stayed at their house.

Q. How long did you stay there?

A. I think two days and a night.

Q. That was the last time you saw them in Mr. Smith's lifetime?

A. Yes, it was the last time.

Q. Occasionally you sent the boys Christmas presents yourself?

A. No.

Q. I say, occasionally you sent the boys Christmas or something of that sort?

A. Yes, I did. I had forgotten that.

CROSS EXAMINATION.

Questions by Mr. Hallam:

Did you always send the boys something in the way of a Christmas present?

A. I cannot remember, Mr. Hallam. I remember when they were little boys, after they left home, almost every Christmas I made little bath robes for them out of eiderdown and got slippers for them and sent them to them. But I don't know that I always sent them every Christmas. I had forgotten it, as a matter of fact, until Mr. Mercer brought it up.

Q. You seldom missed a Christmas, did you?

A. What is it?

Q. You seldom missed a Christmas, did you, sending them something?

A. I cannot remember whether I did.

Q. Mr. Smith always sent them something at Christmas, didn't he?

A. Oh, I think so.

Q. Invariably?

A. I don't know. I didn't always know about

what Mr. Smith did in regard to the children.

Q. You stated that you received no letter from Bess after she returned to California in 1907.

A. You mean after she paid her first visit, had made her visit to Minneapolis?

Q. Yes.

A. I never received one word in regard to any accounting whatever.

Q. Did you write anything to her?

A. That I cannot remember.

Q. You have no recollection, then, of writing her any communication after the occasion of that visit of hers to Minneapolis?

A. No, I have no recollection of it. I may have written her, but I have no recollection of writing her.

Q. Have you ever made any indirect communication to her since that time?

A. Nothing except—No, I may say no.

Q. Now, did you send the children anything Christmas 1907?

A. That was the first year after they went away?

Q. No; the Christmas after Mr. Smith died?

A. I don't think I did. I don't remember.

Q. Are you sure?

A. I don't think I did, because that was the Christmas that I was with Miss Bates at her brother's home and I don't think I sent any Christmas presents to them.

Q. What was the reason you didn't send them anything that Christmas?

A. There was no reason why I should send them anything.

Q. Was that the reason, I am asking you, why you didn't send them anything the Christmas of 1907?

A. No, that was not the reason.

Q. Did you send them anything Christmas, 1908? Objected to as immaterial.

COURT: I will overrule that objection.

A. I don't think I did, no.

Q. Did you send them—

Mr. Mercer: Admit she didn't send them anything at any subsequent time. No use taking up time with that.

Q. Is that admitted?

Mr. Mercer: Certainly.

Q. Is that admitted, that you sent the children nothing at any subsequent time, subsequent to Mr. Smith's death?

A. I don't think I ever sent them anything.

Q. No recollection of giving the children any present of anything since Mr. Smith's death?

A. I have not any recollection of ever doing so.

Q. But before his death you generally did?

A. Yes, I think I did.

Q. Now, in those few things, do you think you were executing Mr. Smith's will?

Mr. Mercer: Wait a moment. Do you mean in sending them Christmas presents, executing his will? I don't think that is proper. That is not material to any issue in this case.

COURT: Did you send any presents in pursuance to what you thought was the will and wish of Mr. Smith?

A. It was the will and what?

COURT: The will and wish of Mr. Smith—that is before his death.

A. Before his death, because it was the wish of Mr. Smith?

COURT: Yes.

A. No, I never consulted Mr. Smith in regard to that.

COURT: What prompted you?

A. Because I always had a tender feeling toward the children.

COURT: I think that is sufficient.

Q. Did you say that you lost that tender feeling for the children after Mr. Smith's death?

Objected to as irrelevant and immaterial to any issue in this case under the pleadings.

COURT: You may answer that question.

Exception allowed.

A. Yes, I think I had always a tender feeling toward them.

Q. I think you misunderstood the question, Mrs. Wallace. The question was, did you lose that tender feeling for the children after Mr. Smith's death?

A. No.

Q. Did you have as strong a feeling for them after his death as before his death?

A. I think so.

Q. Well, you sent them nothing after his death.

A. No, I don't remember that I did.

Q. Did you hear Mr. Hartzell's testimony?

A. Yes.

Q. Here in the case?

A. Yes.

Q. You heard him give his statement of what purported to be a conversation between him and you at the office of Wilson & Mercer, after Mr. Smith's death, did you not?

A. Yes, I did.

Q. Was his account of that conversation true?

A. It was not clear to me.

Q. Did you have the conversation with him that he related?

A. Not as he related it.

Q. I don't understand you.

A. Not as he related it.

Q. The account that he gave of the conversation, then, was not true?

Mr. Mercer: Wait just a moment. I object to that as an improper question as to whether or not a conversation was true. If counsel wants to ask what did happen, that is one thing. But to ask one witness to pass upon whether or not a witness has told the truth in the case is a matter for the court, not the witness.

Mr. Hallam: Correct, if you wish. I don't know any difference.

COURT: You may ask Mrs. Wallace to detail that conversation as she understood it, and then we will have both phases of it.

A. As I remember, my counsel had asked Mr. Hartzell to come to his office. This was after the charges had been brought against me, and both Mr. and Mrs. Hartzell had always known conditions at the house.

They had always been specially sympathetic with P. B. and specially sympathetic with me.

Q. I will ask you to confine yourself to the question.

A. That is the reason why they asked Mr. Hartzell to go to the office, to show that in answer to this first summons and complaint that Bess had sent me. And Mr. Hartzell was there. What conversation we had was all more or less relating to that, and I can't remember that he had that conversation with me or that I had that conversation with him.

Q. Can you remember that you didn't have that conversation with him?

A. No, I can't remember whether I had that conversation with him or not. There were other men there at the time that Mr. Hartzell was there.

Q. Can you say, then, that you didn't make the remark to him that he said you made?

A. I did not make that remark that he said I made, because he—as I remember, in his testimony he inferred that I said I should carry out a contract of some kind. And there was no contract to carry out. And he certainly must have gotten himself very much confused over that, because there was no contract to carry out. I understood when he was on the witness stand that he said that I said that I would carry out a contract, in regard to caring for the children.

Mr. Mercer: No,—P. B.'s wishes, I believe.

A. P. B.'s wishes?

Q. Then, Mrs. Wallace, you wish to be understood as testifying that you didn't say to Mr. Hartzell that which he testified you said?

A. I can't remember what Mr. Hartzell said.

Q. Well, I think Mr. Hartzell said, and I think counsel will agree with me substantially without referring to the record that he said in substance that your remark was that—first he said to you that he was surprised that Mr. Smith had not remembered Bess and the children in his will, or the children—I don't know just how that was—and you said in reply that "Mr. Hartzell, that is one of the finest things he ever did?"

A. Yes.

Q. "He left that to my honor and I am going to see that the boys are well educated and sent to the best school"—something to that effect?

A. Yes. Well, I never said that to Mr. Hartzell. The first part of that was a remark I never made. I did make one—no, I never did say that to Mr. Hartzell.

Q. Did you say that in substance to Mr. Hartzell?

A. I remember saying to Mr. Hartzell, if this is what you mean, that P. B. had given me the greatest compliment that a husband can show his wife by leaving his property to me.

Q. Is that all you said?

A. I did say that. As far as I remember, that is all I said.

Q. Did you say anything about the care of Bess and the children?

A. No; because I had no care for Bess and the children.

Q. You had no care of them?

A. There was no care put upon me for Bess and the children. P. B. never gave—

Q. Pardon me. I didn't hear your answer.

A. There was no care placed upon me in regard to Bess and the children. P. B. never left me the care of Bess and the children.

Q. You felt no care or responsibility concerning Bess or the children?

A. I felt no care or responsibility.

Q. For either Bess or the children?

A. For either Bess or the children.

Q. In a financial way or otherwise?

A. In a financial way or otherwise.

Q. You also heard Mrs. Hartzell's testimony, did you?

A. Yes, I did.

Q. Do you remember Mrs. Hartzell said in reply to the question, what was said, that is, between her and you—Mrs. Hartzell's answer was: "Well, she said that she understood that P. B. had wished, and she intended to carry out his wishes regarding the boys." You heard that testimony, did you?

A. Yes, I did.

Q. Did you make that remark, or the substance of it to Mrs. Hartzell?

A. I did not make that remark.

Q. Did you say anything like that?

A. I didn't make any remark that I understood P. B.'s wishes were such that I had any care or responsibility, financial or moral or physical, any responsibility of Bess or the children.

Q. Do you remember the conversation at all to which Mrs. Hartzell relates or refers in that testimony?

A. I don't remember. I don't remember of ever having any conversation with Mrs. Hartzell.

Q. At any time?

A. No, I can't remember it.

Q. Did you never meet Mrs. Hartzell?

A. I suppose so. I suppose so. I met her a great many times when P. B. was living. She may have come to my house afterwards, but I don't remember it. I tried to think and I didn't recognize her conversation at all. I remember meeting Mr. Hartzell, but that was not until after. I don't remember whether I ever saw him after P. B. died until this complaint was brought against me. I may have seen Mrs. Hartzell. She may have been at my house, or I may have been to her house, but I don't remember. I don't remember our conversation at all.

Q. You knew Mr. C. A. Brown, did you not?

A. Yes.

Q. You do know him?

A. Yes.

Q. He lives in Minneapolis?

A. Yes.

Q. He was sworn as a witness in your behalf in this case and his deposition is on file here.

A. Is that the same Mr. Brown, Mr. Mercer?

Mr. Mercer: Yes. C. A. Brown, St. Anthony & Dakota Elevator Company.

Q. Yes. C. A. Brown.

A. Yes.

Q. He is a man in whom you have confidence, is he? Objected to as immaterial. Mr. Brown is not con-

nected with this case, except his deposition is in evidence. It does not seem proper to ask if she has confidence in him. I don't see how that comes in issue in this case.

Q. I will withdraw that question, and ask the witness—after Mr. Smith's death, Mr. Brown was and still is connected with the St. Anthony & Dakota Elevator company, was he not?

A. Yes, I think so.

Q. The company with which Mr. Smith was connected?

A. Yes. Yes.

Q. Associated with him in a business way?

A. Yes.

Q. And Mr. Dunwoody too?

A. Yes.

Q. Did Mr. Brown and Mr. Dunwoody look after matters for you in any respect after Mr. Smith's death?

A. Mr. Dunwoody helped me a great deal, but I don't remember about Mr. Brown doing very much at all.

Q. Did you look to Mr. Dunwoody for advice in matters?

A. Yes, I did.

Q. And was he authorized to speak for you as your adviser?

Mr. Mercer: Just a moment. I don't see how that is relevant or material to any issue in this case. Mr. Dunwoody is dead. There is no way we can find out what Mr. Dunwoody said.

Mr. Hallam: I expect to show the connection, your Honor; connection with an exhibition I wish to offer.

COURT: With relation to this matter?

Mr. Hallam: Yes.

COURT: I think you can answer that.

Mr. Mercer: I should like to know what counsel means, is Mr. Dunwoody authorized to speak for her.

COURT: We will see about the matter when we come to see what Mr. Dunwoody has to say. You may answer the question.

Mr. Mercer: I would like to know what it relates to.

COURT: I will await developments. You can answer the question.

Q. (Question read.)

A. Why no; decidedly no. Authorized by whom?

Q. By you.

A. By me?

Q. Yes.

A. No, not at all.

Q. Was Mr. Brown?

A. No, not at all.

(Letter marked "Complainant's Exhibit F.")

Mr. Mercer: Do you offer that in evidence?

Mr. Hallam: I offer it in evidence, yes.

Mr. Mercer: This document, Complainant's Exhibit F, purports to be a letter signed by one C. A. Brown, June 26, 1909, addressed to Mrs. Elizabeth Price. The witness has testified that she has not authorized Mr. Brown to speak for her, and we object to it as wholly incompetent and irrelevant to anything in this case, any issue in the case, no relation to it, and it is not proper cross-examination.

COURT: Did you authorize Mr. Brown to write a letter for you?

A. Judge Wolverton, I don't understand what they mean by that. I had no communication from Mr. Dunwoody or Mr. Brown since, well, I think since we finished up our business affairs at the office. I doubt if I have ever seen Mr. Brown since. I don't understand the meaning of it at all.

COURT: I will sustain the objection to the offer of the letter. You may have your exception.

Mr. Hallam: Note an exception.

Q. Mrs. Wallace, did you withhold from the defendant (plaintiff) the knowledge of the death and burial of Mr. Smith until it was too late for her to attend the funeral?

A. No, Mr. Hallam, I didn't, in this respect—

Q. Pardon me. Were you through?

A. I just wish to say this.

Q. Let me ask another question. The answer Yes or No is proper. I want to give the witness every opportunity.

COURT: Ask her the question, then she may make any explanation she desires.

Q. Mr. Smith died on August 16, 1907?

A. Yes.

Q. At what place?

A. At Mount Washington Hotel, Bretton Woods, New Hampshire.

Q. Were you with him at the time?

A. Yes.

Q. You wired that day with reference to his death somewhere, did you not?

A. No, Mr. Hallam. There was a national telegraph strike, as I understand, from one end of the country to the other. I could only telephone to the Boston Washburn-Crosby office when he was stricken, to the representative of the Washburn-Crosby Company to come immediately and bring an extra physician. He died within an hour from the time he was stricken, of uremic poisoning. When he died I telephoned to Mr. Espey, who was the manager of the Washburn-Crosby Company in New York, whom we had seen previously, and I remembered his name. I telephoned because they told me at the Hotel Washington at the town of Brighton Woods—it was a small place—that if I dared to telegraph on that from there, there was only—that I could not telegraph on any of the national telegraph systems; and I insisted upon telegraphing on the railroad system. They said if I dared to do it, it might hold up the entire system and no trains would run, for the other people would strike, and that I could not get out of the place nor take Mr. Smith's body away. So I telephoned to Mr. Espey, and we were delayed 24 hours at Bretton Woods before we could leave for Montreal, and I reached the Soo on Sunday night.

Q. Pardon me, but I want, before you go so far ahead, I want to inquire as to the first day, further.

A. I only sent word through the New York office to wire the Minneapolis office that Mr. Smith had died. I sent no message to my mother. I sent no message to any one else. I could get no messages out. I went to

The Soo, got as far as the Soo, and waited 24 hours for Mr. Smith's body to come on. I could get no messages out of there. And I tried to telephone by the way of Chicago. I tried to telephone every way, and there had been a storm the night before, and the telephone wires were down. I could get no telegraphic communications until, as Mr. Gibson said, Mr. Pennington, the president of The Soo line, was able to reach me over his line. Beg your pardon—I did telegraph to Minneapolis, because I used Mr. Pennington's name. I used his name all over the line, because he was an intimate friend of both Mr. Smith and myself. I presume the only way I could get anything done at that time, because of the strike. And I did get the news to Minneapolis that I was there; but P. B.'s body was not there; and that I would wait 24 hours with my nurse, who was with me, until his body came. And in the meantime Mr. Bell telegraphed to me over the company's line to make arrangements for the funeral, and I arrived in Minneapolis the morning of the 21st, and the funeral was on the 22nd.

Q. What day do you say you telephoned or telegraphed to Minneapolis?

A. That I telegraphed to Minneapolis?

Q. Yes.

A. From the Sault, that is the only time.

Q. The first time you telegraphed to Minneapolis?

A. I never telegraphed to Minneapolis. I could not. I could not from any place.

Q. Now, on the 16th, the day that Mr. Smith died, you telephoned to Mr. Espey?

A. Yes.

Q. In New York?

A. In New York.

Q. You got him without difficulty over the telephone?

A. After a few hours.

Q. But the same day that Mr. Smith died?

A. Yes.

Q. You telephoned him from Bretton Wood, was it?

A. Yes, Bretton Wood.

Q. What message did you give him? What request did you make of him?

A. I merely told him. I made no request. I told him that Mr. Smith had died and to wire Minneapolis.

Q. Did you make no further request than that?

A. No.

Q. Did you specify no one whom he should wire?

A. No one. As I remember I don't think I did. As I remember that is all I could do and say, to try to get home.

Q. Was it your understanding that the wire reached Minneapolis that day?

Objected to. All this is immaterial here, making a mountain out of a mole-hill. It didn't amount to anything one way or the other, except to embarrass the witness by bringing up her grief-stricken days at that time.

Mr. Hallam: I submit this is important.

COURT: I don't see the very great importance of it. The fact is that the telegram was not sent to Mrs. Price for four days after the death of Mr. Smith, and I think the explanation of the delay is very clear; and it is not necessary to prolong the examination further on that subject unless there is something material about it. This is only an incident in this trial. It does not tend to prove any contract or disprove it; just simply the facts of what passed after the death of Mr. Smith is about all there is to that.

Mr. Hallam: Well, there is one other question, and I will be very brief, your Honor.

Q. En route on the train, did you try to send any message on the way back?

A. No, Mr. Hallam. I could not. I could not do a thing until we reached The Sault. And it was only then by coercing a telegraph operator at the Sault station, who refused to do anything for me—by telling him that I would report him to President Pennington, that I got a telegram through from The Sault, on the Sault road to Minneapolis.

Q. Did you offer messages along the route?

Objected to as immaterial.

Q. That is the last question I have. I want to know whether she offered or tried.

A. Mr. Hallam, I wanted to get home, and I wanted to get messages to Minneapolis more than anything.

Q. The question is, whether you offered messages en route, at any point en route on the train.

A. No, not until after I left Bretton Wood until I

reached The Sault, for I was not off the train.

Q. Have you, Mrs. Wallace, stated in full, as you recollect the conversations which occurred between you and the complainant at your house on the occasion of the visit shortly after Mr. Smith's death?

A. I think so, Mr. Hallam.

Q. Have you stated in full the conversations had between you and Mr. Smith in the later years of his life, when you were living with him in Minneapolis, after the complainant left Minneapolis, concerning the complainant and her boys and their future prospects and care?

Objected to as assuming something that is not in evidence, has she stated the conversations.

A. I don't know what conversations you refer to.

COURT: In other words, did you have any conversations with Mr. Smith concerning Mrs. Price, after she left for the stage or for Chicago—after she left for the stage. She left for Chicago after his death.

Mr. Mercer: After she went west.

Mr. Hallam: I refer to the time after she went west to live.

COURT: If you recollect any conversations you had with Mr. Smith about the matter, you may relate those.

A. I have no recollection of any special conversations in regard to Bess and the children. When they went away we spoke of them very often in a casual manner and spoke of the boys. But I don't know of any special—I don't know exactly what special conversation you refer to.

Q. Well, I will ask you a little more specifically—did you have any conversations with him after the complainant left Minneapolis in 1903, in the interval between that time and his death in 1907, concerning the care of the complainant and the children, and their future prospects or property?

A. No.

Q. Money matters in reference to them.

A. No, not that I ever remember.

Q. You don't remember any at all?

A. No indeed.

Q. Don't you remember his mentioning that subject in that time?

A. If he did, I don't remember what it was now, because there would be no reason for me to remember it.

Q. If he said anything concerning any disposition in their favor in the future?

A. There was never such a thing. You mean as a contract or an understanding?

Q. Any disposition at all in their behalf or favor after he was gone?

A. None whatever.

Q. Did he ever mention to you his ideas concerning them and their prospects after he died, if he should die, when he died?

A. Never. Never. No.

Q. He never discussed with you property matters in those four years with relation to the complainant and the children?

A. Mr. Hallam, Mr. Smith was a very reticent man in regard to his business affairs.

Q. Yes, that has been testified to here various times. But will you answer specifically the question? Perhaps you are leading to an answer—I don't know.

A. I don't remember of any time that Mr. Smith and I had any conversation in regard to my future in case of his death and especially Bess' and the boys' future. I remember nothing about that.

Q. Did he speak often of the boys and Bess?

A. Yes; especially of the boys. And especially of Donald. He was more fond of Donald than the other child.

Q. In what terms did he speak of them?

A. Well, just as—I can say endearing terms, if you would like to have me say that.

Q. I don't mean the special terms, but in general what was the manner of his conversation concerning them?

A. We didn't have many conversations about Bess and the children.

Q. Well, will you be a little more definite than that about how often he spoke of them?

A. I cannot tell you, Mr. Hallam.

Q. But very seldom?

A. Very seldom.

Q. When he did speak of them, how did he speak of them in a general way? Perhaps I can make what I mean a little more clear with reference to his being fond of them or otherwise; if at all.

A. Well, I don't think he expressed himself very much about the boys.

Q. But you say he did occasionally. Now, on the

few occasions when he did express himself about the boys, did he express himself as being fond of them or otherwise?

Mr. Mercer: I tried to admit three or four times that Mr. Smith was fond of these boys.

Mr. Hallam: I am not asking for counsel's admission.

Mr. Mercer: To stop any question about that.

COURT: I will hear you with regard to the boys.

A. He was very fond of the boys when they were babies. He loved Donald, I think, much more than he did Bobby. But as they grew older and he saw them but twice he seemed to drift away more from them, and he spoke less of them from year to year than he did when they first went away.

COURT: That answers the question. I don't think it is necessary to go further.

Mr. Hallam: I think so, your Honor.

Q. At the last, did he speak of them much or at all?

A. I don't remember, I don't remember the last time he spoke of the boys. I think it was probably after our trip, our last visit to see them, after the earthquake.

Q. Was it at his suggestion or your suggestion that you made that visit to see them at Mill Valley, after the earthquake?

A. Oh, it was his suggestion.

Q. The former trip there, about which you have testified, was that at his suggestion or yours?

A. Yes, it was his suggestion, Mr. Hallam.

Q. In the wire which you sent the complainant after Mr. Smith's death, here in evidence, you state that

letters would follow—perhaps you have not seen this wire, have you?

A. Yes, I think I saw it.

Q. It reads that "P. B. died suddenly. Heart failure. Funeral Wednesday. Letters follow."

A. What date is that, please?

Q. That is dated the 20th and received the 21st.

A. Well, Mr. Hallam, I think that I arrived in Minneapolis the morning of the 21st.

Q. Well, I am not inquiring as to that.

A. And this telegram was sent before I arrived in Minneapolis. And I think that Jessie must have taken upon herself to wire Bess, because I know she wired my mother without my knowledge. All this was done before I arrived at Minneapolis.

Q. What I am getting at is this: You did ask Jessie Carey Smith to write Bess some days later, as she states in her letter. Did you or did you not?

A. Yes, I must have done so.

Q. Do you remember that?

A. Yes, I think so.

Mr. Mercer: Do you mean, write her what was done in the matter or write her a letter?

Mr. Hallam: I said write her a letter.

Q. And you knew that Mrs. Smith did write her, didn't you?

A. I suppose so. Mrs. Smith did many things for me.

Q. I will show you complainant's Exhibit E, and ask you if you saw that letter before it was sent.

A. I don't believe I did see the letter before it was sent.

Q. Did you see a copy of it?

A. I don't think so.

Q. Well, will you look it over and say if it is accord with the letter that you requested her to send?

A. I don't think I told her any special thing to write to Bess. I think it was just at the time of the funeral or at the time that I was rather hard pressed with other matters; and if I remember, I told her to write to Bess, and I don't think I ever told her what to write any more than I should have told her to write to some relative of my own, and just as I used to tell her to make a letter for me.

Q. Well, I ask you, Mrs. Wallace, referring particularly to this part of the letter where Mrs. Smith says to the complainant, "I know that you must feel, with many of the rest of us that you have lost a dear friend. I wish though that you might realize just what a loss P. B.'s death is to so many people; there are literally scores of people here and outside of the city who take it as a personal loss. I think he was a man who drew from his friends a peculiar quality of affection and that he was very dear to an unusual number of people." Is that correct or did that meet your concurrence?

A. Mr. Hallam I don't think I knew that she wrote that letter.

Q. Well, I ask you now—does it now? Is that correct?

A. I think that is a very tender letter in regard to Mr. Smith's memory.

Q. What?

A. I think it is a very tender letter in regard to Mr. Smith's memory.

Q. Now, one other thing in this letter I want to call your attention to. It is the following clause: "He died on Friday, the 16th of August at one o'clock p. m. Dewey says that the night before at dinner, she lifted her glass to him and said, 'Well, here's ho, Dada.' Of course this brought Donald to mind, and P. B. began talking about both the boys, how much he thought of them, and said he would give a good deal to see them. He was certainly very fond of them and very proud of them too." Is that correct?

A. Well, I would not be surprised if that did happen, because it was a little toast that we always carried out in the house, when the boys were there and after. Donald would sometimes take his little glass of water, and say, "Well, here's ho, Dada." He always called Mr. Smith Dada, and whenever any of us felt a little tender—if we felt like it. That night, if I remember this, we had some claret for dinner, and I do remember now that Mrs. Smith has written that, I told her about that last conversation, the last dinner which we had, in which I said, "Here's Ho, Dada." And I have no doubt that he did speak of the boys because he was very naturally a tender man.

Q. It is true, as she says, that he was certainly very fond of them and proud of them at that time?

A. As I said, he was very fond of the boys, and especially when they were little boys, and especially so of Donald.

Q. I am asking you now, Mrs. Wallace, with reference to this time, the night before he died, was he very proud of the boys, as Mrs. Smith says in this letter?

A. Yes, I think he was.

Q. And very fond of them?

A. Yes, very fond of them. They were handsome boys.

Q. Mrs. Wallace, you heard the testimony of Mr. Price here on the stand in this case, did you?

A. Yes.

Q. You didn't hear any conversation between him and Mr. Smith there at Mill Valley, I suppose, on the occasion to which he referred?

A. You mean you didn't hear any conversation?

Q. You didn't hear the conversation.

A. No, I heard no conversation between them.

Q. Had Mr. Smith had any similar conversation with you to that which Mr. Price related, at any time during the last years of his life?

A. No.

Q. You heard the conversations which Mr. and Mrs. Hartzell related as having had with Mr. Smith before his death, did you not, on the witness stand?

A. Yes.

Q. Did Mr. Smith have conversations with you, or any conversation substantially like those which Mr. and Mrs. Hartzell related?

A. Well, Mr. Hallam, I don't exactly remember the words of the conversation that you speak of that Mr. and Mrs. Hartzell related. Their conversations were

different. Mr. Hartzell's conversation was very much different from Mrs. Hartzell's.

Q. Yes, that is true. And I will ask you particularly concerning Mrs. Hartzell's report.

A. As I said before, I didn't remember Mrs. Hartzell's conversations at all, so I should have to have them repeated.

Q. I will ask you, then, more specifically, do you remember Mrs. Hartzell on one occasion saying that Mr. Smith said to her that he would rather lose his right hand than to lose those boys, or something to that effect?

A. No.

Q. Well, I will ask you further, did you have any conversation with him at one time expressing his desire or intention to take care of the boys or their education in the future? Did he so express himself to you?

A. No, he never expressed himself to me, because it was understood when we were married that Bess and the children would not always live with us; and he could not have expressed himself in that way to me.

Q. In the letter which you have offered in evidence, or the copy purporting to have been made by yourself of the letter written by Mr. Smith to Mr. E. A. Wright—

A. Yes.

Q. You have observed, probably, that he stated there that if he prospered as he hoped he would attend to the suitable education of the boys.

A. Yes.

Q. Did he express himself to you that way orally also?

A. No; he has never. He never said that to me. But I have heard him say that to others, that if he lived and prospered he hoped to look after the boys' education.

Q. But he never said that to you?

A. No, not as I can remember, in any way.

Q. Can you account for the fact that he didn't do that after his death?

Mr. Mercer: You mean that he didn't do it before his death?

Mr. Hallam: That he didn't make any provision whereby that could be done after his death?

A. Can I account for it?

Q. Yes.

A. No, I cannot, Mr. Hallam.

Q. Can you account for the fact that Mr. Smith gave the complainant and the boys money and presents before his death but made no such provision after his death?

A. No, I cannot account for it. It was as much of a surprise to me as it was to any one.

Q. You know of no theory upon which you can account for that?

A. I have no theory upon which I can account for it. I didn't know that he had changed his will. I had no inkling that he had changed his will. I absolutely was as sure as I am sure of anything that when we went down to the office that I would find that will that he made the day of our marriage. I expected it from the time we were married until Mr. Smith died.

Q. I think you testified yesterday that Mr. Smith

told you about that will when you were on the train, did you? That will was made at Fargo.

A. No. No, Mr. Hallam.

Mr. Mercer: She was not on the stand.

A. I was not on the stand yesterday.

Q. I mean this morning.

A. No, Mr. Hallam. I said that Mr. Smith gave me a copy of that will in my own home, in the hall, before we left for the train.

Q. Oh, he gave you the copy of that will in Fargo?

A. Yes, in Fargo; right after we were married.

Q. Was that the first you knew of it, when Mr. Smith gave you the copy of it?

A. Yes; that was the first I knew that will had been made.

Q. Was that the first you had heard about any such will?

A. It was the first I had heard about any such will. In fact, I never had thought of a will. It never occurred to me. I never thought of a will being made that day or at any other time; never thought of it. It never occurred to me what provision he would ever make for me.

Q. No one had mentioned it to you?

A. No one had mentioned it to me. I will take that back. I think my brother was there, and something was said, "Well, P. B. has gone over to Mr. Douglas' house. P. B. tells me he had gone over to Mr. Douglas' to sign his will." And then was the first time that I knew about the will. But I paid no attention to it until Mr. Smith brought me the copy of the will.

Q. Your mother was living with you at Fargo at that time, wasn't she?

A. Yes, my younger brother.

Q. I said, your mother, Mrs. Wallace.

A. My mother, yes.

Q. She lives there yet, does she?

A. Yes.

Q. She lives at Fargo?

A. Yes.

Q. Of course you were on the usual cordial relations of mother and daughter with your mother?

A. Yes, I had a letter from her within the last two weeks.

Q. I don't refer to now, Mrs. Wallace, but at that time.

A. Yes, very nicely managed in my own home—in her home rather.

Q. She hadn't told you anything about this will before the day of the wedding?

A. Why, she knew nothing about it.

Q. You are sure about that?

A. I am very sure, Mr. Hallam. Mr. Smith did not arrive in Fargo until the morning of our wedding. How could she have known anything about it?

Q. Isn't it possible she could have known without communicating the fact to you?

A. Why, no; I don't see how she could have known.

Q. Mr. Smith was a man who never owned real estate—I think that is admitted in the case, and you know that to be a fact, do you not?

A. I understand so.

Q. Except, I think, there was a burial lot. But beside from that, he owned no real estate, did he? He owned a burial lot, didn't he?

A. Yes.

Q. Aside from that, he owned no real estate?

A. No.

Q. He owned stocks and bonds?

A. Yes, stocks especially.

Q. Largely in companies with which he was connected?

A. Yes.

Q. And his assets were in good securities and in money. He was a man who always had a good deal of ready cash, wasn't he?

A. Yes.

Q. Do you know how much cash he had at the time of his death?

Objected to.

Mr. Hallam: I will withdraw that question for the present.

Q. You were the executrix of his estate, made the inventory of his estate—or rather you verified the inventory of his estate in Minneapolis, Probate Court?

Mr. Mercer: That is admitted in the pleadings, and it is admitted that she verified it.

COURT: You may answer that you verified the inventory—do you recollect—

A. Well, Judge Wolverton, I suppose I must have; but I knew very little about business at that time. Mr. James Bell and some one else took entire charge

of that, and they just told me—I just went along as they told me to. Beyond that I didn't know—

Mr. Hallam: The point is, there is no money return in the inventory.

Mr. Mercer: They have not shown there was any money on hand.

COURT: How does that affect this case?

Mr. Hallam: It affects this case in this way. This is verified by the defendant as being a correct inventory and return of his property. Our position is that this complainant is entitled to two-thirds of it. If part of it was withheld from the inventory, the only assignable reason can be that it would thereby affect injuriously the rights of this complainant. There must be some cause if any property that should have been in the inventory, verified as it is, was not returned with the inventory.

COURT: Do you intend to go into an accounting at this time?

Mr. Hallam: No, your Honor.

Mr. Mercer: In the answer in this case we have pleaded that the amount of the inventory which they set forth was the inventory that was filed. We have set forth that there was a note, this one that was given to Bess, that was not put into that inventory, and that was turned over to her; and that, I believe, we found maybe eight shares of stock and a little mining stock or something of that kind, that didn't amount to anything.

COURT: I will sustain the objection on the ground that it was not cross examination.

Mr. Mercer: Yes, it is not cross examination.

Mr. Hallam: Note an exception.

COURT: Very well.

Q. Mrs. Wallace, that burial lot was not probated, was it?

Mr. Mercer: Objected to as irrelevant and immaterial and not proper cross examination.

COURT: I don't see what that has to do with the case, Mr. Hallam. I suppose the lot is not very valuable and is not valuable to anybody else besides the family. So I don't see how that has any effect on this case.

Mr. Mercer: Not intended to be used by anybody but the family.

Mr. Hallam: It is the lot where this complainant's mother is buried. My position is, it has not been probated.

COURT: That hasn't any effect in this case. There are three things related in this case. You have attempted to prove them on your part. The defense has attempted to disprove them. I think you better confine yourself to those issues alone.

Mr. Hallam: Well, if I may have an exception, if the court please.

COURT: Very well.

Q. Mrs. Wallace, you testified in your direct examination, upon Mr. Mercer's inquiry, if I understood you correctly, that you were invited over to lunch with Mr. Smith on the occasion when you first met the complainant. Is that correct, that you were in St. Paul and were invited over to Minneapolis?

A. No. I thought I told you, Mr. Hallam, that

my brother and I were in Minneapolis at the time. I had just come down from Fargo. I think I told you that. And later we went over to St. Paul. My brother went on east that night, and I went to visit Miss Bates.

Q. Well, then, is the fact that you arrived in Minneapolis from Fargo that morning?

A. Yes.

Q. Where did you meet Mr. Smith?

A. As Bess said, at—

Q. At his office?

A. No, not at his office. My brother telephoned to Mr. Smith and asked him to have lunch with us. And Mr. Smith said—he was at the office. He said, “I will meet you at the Metropolitan Theatre, and we will go to Shieks together.” And after we were there he said he would send for Bess.

Q. For a number of years before that you hadn’t seen Mr. Smith, had you?

Objected to as irrelevant and immaterial.

Mr. Hallam: It relates to direct examination.

A. No.

COURT: She has answered the question.

Q. Had you seen him at all frequently in the previous eight or ten years?

Objected to as irrelevant and immaterial. We simply went into enough of that to show the conversation there. There is no use to go back to try out the friendship.

COURT: You may answer the question.

A. I only saw him once. He went to Fargo with Mr. George Burnham, a friend of friends of mine.

They asked Mr. Burnham and Mr. Douglas to dine with him that night. They had a young lady daughter, Mrs. Douglas telephoned to me to come over and dine with them. I accepted, and when Mr. Smith was on his way up to the house he stopped in, and my mother went to the door, and hadn't seen him for a number of years, and they had always been fond of each other. He came in and said he had come to call, he was on his way to Mr. Douglas'. My mother said, "Well, Dewey is going over there to dine too." He said, "Good, I will wait for her until she goes over." I hadn't seen him for years up to that time.

COURT: I think that is enough.

Mr. Hallam: Yes, I think it is.

Q. What month was that in, if you remember?

Mr. Mercer: That is, you mean at Fargo, or the time they met in Minneapolis?

A. At Minneapolis?

Q. Yes. This meeting at which you went to lunch.

A. I think it was the 14th of February.

Q. You were married the following May, the same year?

A. Yes.

Q. During that interval between the 14th of February and the day of your marriage did you make one more visit at Mr. Smith's house in Minneapolis?

A. I was there at a number of times. That first visit I was up with Miss Bates for three weeks, and either Bess or Mr. Smith asked me over for the week end, I think, the three Sundays that I was there. I

then went home, and I went down again the second time to Miss Bates' house.

Q. Did Bess give some social function in your honor?

A. Yes.

Q. And your recollection is that on the evening of your engagement to Mr. Smith that is true, as the complainant says, that you and she occupied the same bed—you and the complainant?

A. Miss Clarke was there at the same time. I think there was a little cot put up in the front room. Miss Clarke had come over to go to dinner with Bess, and I think there was a cot in the same room, and I think Miss Clarke was there. We all stayed there.

Q. You heard the complainant's testimony that at that time you told the complainant that you would not take her Dad away from her, or something to that effect, did you?

A. I didn't remember of saying that.

Q. What did you say to the complainant?

A. I don't remember what I said.

Q. You said something to her, didn't you?

A. I told her Mr. Smith had asked me to be his wife.

Q. Was that all you said?

A. I don't remember the conversation that we had.

Q. Mr. Smith had spoken nicely of her to you up to that time, hadn't he?

A. Always.

Q. And up to the time of your marriage, hadn't he?

A. Yes.

Q. It was after your marriage that these troubles all began, wasn't it?

Mr. Mercer: Objected to as being an improper cross-examination. She cannot possibly know, because she was not in the home.

Q. As far as you know.

COURT: You may answer that.

A. Will you give me the question again?

Q. It was after your marriage that the trouble between Mr. Smith and the complainant began, as far as you know, wasn't it?

Mr. Mercer: Do you know of any before, up to that time?

A. Nothing of any—yes, I did. I did decidedly.

Q. What was it?

A. I would rather not tell, Mr. Hallam.

Q. You said Mr. Smith always spoke nicely of her?

A. Yes.

Q. Said Bess was an attractive girl and fond of her children, didn't you?

A. Yes; she was an attractive girl.

Q. Yes; but I say, Mr. Smith said that to you, didn't he?

A. Yes.

Q. Well, he said nothing at all to you about property matters at that time. I mean, making it more specific, around the time of your engagement—at or about the time of your engagement to him?

A. He never mentioned property matters except that one business talk that we had the night after our

engagement, when he told me about his business condition or his finances. He never spoke of it till then.

Q. Now, what did he say at that time?

A. I told you a short time ago, Mr. Hallam.

Q. Well, I think it was in your direct examination.

A. Oh, I beg your pardon.

Mr. Mercer: Yes, he is entitled to ask you again, I suppose, if the court does not object.

COURT: He has a right to ask about that if he wants to test your recollection about it.

A. Yes, we went out to take a walk around the block, and he said then, "Dewey, I am not a rich man by any means. I have property to the value of about \$40,000," and he said, "but I have a good salary. As the time goes by I feel that I will accumulate much more; that we can have all we want to live on in the future; that Bess is attractive; she will doubtless marry; she loves her children, and will take them with her. I will be alone in the home, and I want some one to stay with me."

Q. Didn't he say anything about providing for Bess in any way?

A. Not one word.

Q. Nor her children?

A. Not one word.

Q. Say anything about his being under any obligations to the children?

A. Not one word.

Q. Did you ever have any talk with him about how Donald MacLean was sent away?

A. Only one conversation.

Q. What was that?

A. In which he told me that he was always living in fear that Donald might forge his name, because he was responsible for a great amount of money in his business.

Q. Well, but did he ever say anything to you about Donald's relations to Bess and the boys?

A. No, Mr. Hallam. Mr. Smith was of that happy nature that the disagreeable things were thrown aside when he came into his home.

Q. Were his relations to Bess and the boys disagreeable things?

A. I thought you referred to Donald MacLean, Dr. MacLean.

Q. Possibly you misunderstood me. You may have misunderstood me in regard to that. I meant in regard to his relations to Bess and the boys—Mr. Smith?

A. We had no long conversations about Bess and the boys.

Q. Did you ever have any conversation with him about the divorce of Dr. MacLean and Bess?

A. No, I don't think so.

Q. Now, when you went into the home you knew that Bess was there with the two children, didn't you?

A. Yes.

Q. Was that ever discussed between you and Mr. Smith before you were married?

A. No.

Q. As to what their status was to be there or whether they were to stay there?

A. No, beyond the fact of that first talk that we

had was when he said that she doubtless would marry and take her babies with her—take them away.

Q. Was there anything at all said between you and Mr. Smith as to whether Bess was to stay for the present, or the children?

A. No.

Q. Or whether they were to go?

A. No.

Q. Nothing said about that at all?

A. No.

Q. Was anything said between you and Bess about that?

A. No, Bess and I never had any conversation about that.

Q. I will ask you, then, if you didn't know when you married Mr. Smith whether the complainant and her children were to be members of the family or not.

A. I only remember what Mr. Smith told me after we were engaged.

Q. I mean for the present, for the time being.

A. Yes, surely.

Q. Nothing was said. You had no understanding about that?

Mr. Mercer: She has already told you what was said about it.

Q. The point I am getting at is this, Mrs. Wallace; perhaps I have not made myself entirely clear. Was there nothing specified between any of you as to whether the complainant and the boys were to constitute part of the family, from the beginning, after you returned from your wedding journey, or not?

A. Why they were supposed—they were right there when we came back, and I think Mr. Smith told me that I was to take charge of the house. And I took it for granted that Bess and the boys were there till she married or there was some reason why she should go away.

Q. But nothing was said about it?

A. Oh, nothing particular. No, I don't remember of anything being said.

Q. You and Bess had been very cordial before the marriage, had you not?

A. Yes.

Q. Entirely so?

A. Yes, seemed to be.

Q. Such relations as are common preceding an event of that kind—the marriage, I mean?

A. Yes.

Q. Was there any friction after the marriage between you and Bess?

A. Mr. Hallam, I cannot remember of Bess ever objecting to anything in the house except twice. Beyond the fact that from her attitude and from the attitude of her friends I knew that she was displeased with me. But she never mentioned but twice that I can ever remember her displeasure in what I had done.

Q. And did you, Mrs. Wallace, did you make Bess feel at home in the family after you were married to Mr. Smith?

A. Well, Mr. Hallam, I think that is a ridiculous question. I don't know how to answer that.

Q. Well, did you do what you could to make her feel at home?

A. Why, I certainly did.

Q. Did she feel at home after you were married to Mr. Smith?

A. She should have felt at home.

Q. As far as you observed?

A. She should have felt at home.

Q. Well, did she, as far as you observed?

Mr. Mercer: Objected to as calling for a conclusion of the witness. It is wholly immaterial.

COURT: You may ask her how she and Bess got along after the marriage. And I think that will settle it.

Q. You may answer the question of the court.

A. How we got along after our marriage?

COURT: How you and Bess got along after you were married to Mr. Smith. Did you have any disagreement with her?

A. No, Judge Wolverton, there was no apparent disagreement.

Q. Did you find your relations to the the children agreeable? Did you find it agreeable to have the children there in the house?

Mr. Mercer: Objected to as irrelevant and immaterial to any issue in this case. It does not make any difference.

COURT: You may answer that question, whether the children were disagreeable to you.

A. No, the children were not in any way disagreeable to me in the house at all.

Q. Were you fond of the children?

A. Yes, I was fond of the children.

Q. Did you love them?

A. I cannot say I loved them, but I was fond of them. They were attractive children. Bobby was nine years old. I had a great deal of care of the children, and I had more or less responsibility of the children, and it was something that I was not, that I quite understood about the care of them.

Mr. Mercer: You didn't mean nine years old, did you?

A. Oh, no.

Mr. Mercer: I understood you to say Donald was nine years old.

A. Robert was nine months old at that time. He was a little baby. Yes, I was fond of children.

Q. You say you had a good deal of the care of them?

A. I had a great deal of responsibility. Bess was away a great deal of the time when I was there with them, changing nurse-maids, as I say, I had the nurse to see that things were attended to, and to see that they were in the house. When Bess went away at times she would give orders that some of her friends could come and take the children out for the day. I had to watch that. And I had to see that they were returned.

Q. Well, there was a nurse-maid who had constant care of them, was there not?

A. Constant care, except when I was there alone I had the nurse-maid wait on the table at dinner after she had put the babies to bed.

Q. Had you ever had the care of children before?

A. No, I never had had the care of children before. Yes, I had had the care of my brother's children for about six months, a year or so before. But beyond that I never had had the care of children.

Q. Well, I don't know whether I am correctly informed, but had you been engaged in the business of nursing, or not?

A. No, I never had.

Q. Your first husband was Captain Grahame, was he not?

A. Yes.

Q. He had a child, didn't he? Didn't he have a child?

A. Yes.

Q. Did you have the care of that child?

A. He was quite a grown boy when I was married to the Captain, and the Captain didn't live quite three years.

Q. How old a boy was he when you were married to the Captain?

A. 11 years old.

Q. And the Captain died in about three years?

Mr. Mercer: That is not material.

COURT: I don't see what is the use of taking up the time that way. It is outside of this question.

Mr. Hallam: It is intending to test the question of her fondness for children. I want to ask her where the boy went, what became of him.

COURT: I think you have gone far enough into that question of the fondness for children.

Mr. Hallam: Very well.

Q. You testified, I think, Mrs. Smith, that your understanding was that the Fargo will, of which you had a copy—

A. Yes.

Q. Of which Mr. Smith furnished you a copy, you supposed was his will all along down to the time of his death.

A. Yes, I supposed that that was his will down to the time of his death.

Q. You had a copy of the will, did you—kept that copy, did you?

A. I had a copy, yes.

Q. Did he ever mention that will to you again?

A. No.

Q. Did he ever mention the subject of a will in any way again after that?

A. Never.

Q. You say you went to Mr. Bell's office, and he produced the last will. A. Yes, Mr. Hallam.

Q. Showed it to you?

A. Yes.

Q. And that was a great surprise to you?

A. A very great surprise.

Q. And he gave you no instruction or directions in any way in relation to that will or his property affairs after he was gone, as regards the complainant and the boys?

A. He gave me no instructions in regard to property affairs in regards to Bess and the boys.

Q. No suggestions?

A. Not a suggestion.

Q. Did you, after he was dead, make any statement to the effect that he had?

A. No, I never did. Why, I could not. He had never made the suggestion.

Q. Or that he had expressed to you any such intent or wish?

A. He never expressed such an intent or wish.

Q. You never made any such statement that he so expressed any such intent or wish?

A. That I was to take charge of—or what do you mean?

Q. Well, make any property disposition or care of them.

A. No.

Q. Or the education of the children?

A. No, I never made such a remark.

Q. He told you when he gave you a copy of the will that you had better keep it?

A. Well, he said put that away among your things, Dewey. That was all.

Q. He told you that was his will?

A. He said it was a copy of his will, yes.

Q. Or a copy of his will. Did he say that was the arrangement he wanted to make of his affairs?

A. He said nothing more. He went right on; went right by me; and there were a number of people around, and there was more or less confusion. We were there at my wedding, and we were about to leave; and he passed by when he handed it to me.

Q. Did he also give you a policy of life insurance?

Mr. Mercer: Objected to as irrelevant and immaterial to any issue in this case.

COURT: What is the point about that, Mr. Hallam?

Mr. Hallam: Under some of the decisions I think there are authorities that would cover that. It seems to me that all the transactions relating to the property in this connection in a situation of this kind are more or less material, perhaps somewhat remotely.

COURT: I will sustain the objection.

Mr. Hallam: I may have an exception. I would like to make an offer.

COURT: Very well. You may make the offer.

Mr. Hallam: I offer to show by this witness that at or about the time of her marriage to Mr. Smith, in May, 1902, a policy of insurance upon Mr. Smith's life was obtained by Mr. Smith, in which the defendant was named as beneficiary, and that this insurance accrued to the defendant upon his death, and in the sum of \$50,000. I am not sure of the amount, but I think that is the amount. That is what I offer to show.

Mr. Mercer: I object to that. There was no such policy as that in any such amount. Whether there was a policy of one thousand dollars or two, I don't know. But the witness could not testify to that unless it is something that we never discovered.

A. I can testify to that.

COURT: I will allow the witness to answer that and clear it up.

Mr. Mercer: Exception.

COURT: Do you know whether he took out a policy in your favor or not?

A. No, Judge Wolverton, I would say he did not. After we had been married a number of years he took out a policy.

Q. Are you sure?

A. Yes.

Q. Didn't he take out a policy in 1902 in the Provident Life and Trust Company, of Philadelphia, Pennsylvania, in which you were named as beneficiary?

A. If he did I never received anything until an annuity after his death.

Q. Didn't he obtain that insurance in 1903?

Mr. Mercer: Objected to on the further ground—

COURT: I don't see any use going into that any further.

Mr. Mercer: I want the further objection that under the laws of Minnesota, where he lived, if there had been any policy taken out with her as beneficiary, she would have owned the proceeds. There would not have been anything for the estate or any one else.

Mr. Hallam: I don't claim that. She was named as beneficiary, I understand. May I have an exception?

COURT: You may have an exception.

Q. Mrs. Wallace, you knew that a claim was made upon you on this matter before this suit was brought, didn't you—immediately before?

Mr. Mercer: She testified she knew about the case in Minnesota, that that was the first claim. That was her testimony.

Mr. Hallam: Yes, but the point I am getting at is that a claim was made upon her immediately before this present suit was brought in this court.

Q. That is, you knew that through your husband, didn't you?

Objected to as irrelevant and immaterial.

COURT: Did you make a demand on her for the entire claim of this suit?

Mr. Hallam: The fact I want to bring out is—

Mr. Mercer: We will admit, Mr. Hallam, that you went to Mr. Wallace and told Mr. Wallace you would like to know if there could not be some way of getting a proposition of settlement on this old matter, and that he declined.

Mr. Hallam: I want to show a good deal different from that. Will you admit that I gave him a copy of the bill at his request or at my suggestion in order to take it up with his wife before it was filed, and that there were several negotiations between him and me, and that he suggested a delay of a few days might save several months after the bill had been forwarded here by Mr. Jackson and was ready for filing. Will you admit that? That is what I want to show. Will you admit that Mr. Wallace had a copy of the bill from me and kept it several days to look over it?

Mr. Mercer: I don't see how that is material.

COURT: That has reference to the present suit?

Mr. Hallam: Present suit. A copy of the present bill before the bill was filed.

COURT: Did you deliver that to Mr. Wallace?

Mr. Hallam: To Mr. Wallace. He kept it several days and returned it before the bill was filed.

Mr. Mercer: Mr. Wallace tells me, subject to the objection that it is immaterial to any issue here, that Mr. Hallam came to Mr. Wallace's office and asked if there was not some way that they could get some kind of settlement out of this old matter. And Mr. Wallace later reported to him that they could not, would not do anything about it. And that Mr. Hallam then asked him to take a copy of this complaint and look it over. And that Mr. Wallace told him finally, after reading the complaint, that there was not any use in pursuing the proposition for attempted settlement.

Mr. Hallam: And that he took it and kept it several days with the understanding that he was taking it to his wife to look over.

Mr. Mercer: Two days and a half, he says.

Mr. Hallam: I guess that is true; with the understanding that he was to go over it with the defendant.

Mr. Mercer: We will admit now that she denies any liability in this case, if that is what you want, and claims that the whole matter has been once adjudicated; that there never was anything to it anyway.

Mr. Hallam: She doesn't claim that the matter was not presented to her.

COURT: You are taking up a lot of time on a matter that is very small so far as its effect on this case is concerned.

Q. This will, a copy of which Mr. Smith handed you and which you kept through these years—did you read the will?

A. Yes. Yes, Mr. Hallam.

Q. You observed that therein he called the complainant his adopted daughter?

A. Yes.

Q. Was that your understanding of the relations between them from that time on, and formerly?

A. I never thought very much about it, Mr. Hallam.

Q. Never thought much about it. Then, I understand you that except as therein defined, in all your relations with Mr. Smith, the complainant's relations in the family or to him at all, were never, as between you and him, mentioned or defined?

A. Very seldom.

Q. Well, were they at all, as to what her relations in the family and her status in the family was?

A. I wish you would repeat that question, Mr. Hallam.

Q. Well, it is pretty long. Perhaps I can simplify that a little. Except as you noted the language of this will, was there ever any time when Mr. Smith ever mentioned or defined the relation in which he understood the complainant stood in his family?

A. Why, no.

Q. Never?

A. No.

Q. You have heard him introduce the complainant to people as his daughter repeatedly, have you not?

A. Yes, I think he used that expression.

Q. Did you ever speak to him or inquire of him

about what the complainant's relations were to him?

A. No, Mr. Hallm.

Q. What was your reason, if any, for not doing that?

COURT: I suppose she knew it anyhow.

Mr. Mercer: As far as this will was concerned—it specified what, under that will, she would have in the way of property.

Q. You stated, Mrs. Smith, that you understood the money that you advanced to Mr. and Mrs. Price on the occasion of that visit in August, 1907, was to buy tickets to go back to the west?

A. They asked me for the money to buy tickets to go back to the west with.

Q. You supposed they had used it to buy tickets, you say, the \$100.00?

A. I supposed so. I supposed that was what it was to be used for.

Q. You say that Emily Carlson, soon after you returned from your wedding journey, brought you a list of bills that had been incurred in the house?

A. Yes.

Q. What conversation was had between you and Emily about that?

A. I don't remember we had any conversation.

Q. What bills were they, do you remember? I mean whose bills.

A. They were unpaid bills.

Q. I mean what business houses?

A. I don't know.

Q. Do you remember any of them?

A. No, I don't.

Q. How many of them were there?

A. I have not any idea. There were enough bills to cause a scene when Mr. Smith got them.

Q. How large were they?

A. I can't even tell that.

Q. Now, I think you testified that it was Mr. Smith's habit to pay all his bills promptly, and had been.

A. Yes.

Q. However, you don't know personally the conditions before you married him, do you?

A. Not at all.

Q. You considered that you were under no obligations, legally or morally or of any kind, either to the complainant or the children after Mr. Smith's death.

A. I have considered it so.

Q. That all obligation was at an end?

A. Yes.

Q. At the time that Bess was about to go on the stage, you referred to an incident in St. Paul, and you asked Bess how she could find it in her heart to do such a thing as that, or something to that effect, did you?

A. Yes.

Q. Of that sort. What was it about it that seemed cruel—the fact of going on the stage?

A. I don't know. I think the fact that Mr. Smith was feeling so badly at the time.

Q. What did Mr. Smith want her to do?

A. I think he would have preferred to have had her

go back to her relatives or go where she would have more protection, she and the children.

Q. Did he want her to leave the home? Did he want her to leave your home?

A. He only said so at the time that Mrs. Smith and we were all together in the library.

Q. I will ask you, Mrs. Wallace, did he insist on her leaving your home?

A. No, he never did insist upon her leaving the home.

Q. Did he tell her she must go?

A. At that time? At that one time?

Q. Well, was that his position from that time forward?

A. Oh, no, I think not. I think he always—no, I cannot say that that was a firm position.

Q. But he didn't want her to go on the stage?

A. No, he didn't want her to go on the stage.

Q. Did he have a definite idea, Mrs. Wallace, as to what he did want her to do, or can you tell?

A. No, Mr. Hallam. Mr. Smith was, as I say, a man of few words, and there was very little talk between him and myself in regard to what he wished Bess to do. When the time came for him to make a stand, he would get Mr. and Mrs. Smith over and they would talk and decide.

Q. Did you wish Bess to go, to leave home at that time? Was it your wish?

Objected to as irrelevant and immaterial to any issue here.

COURT: I will sustain the objection.

Mr. Hallam: May we have an exception?

COURT: Very well.

Q. Did you wish the children to be placed elsewhere than in the Smith home?

Mr. Mercer: Same objection to that. It could not possibly make any difference. She would have a perfect right if she wanted to.

COURT: I will sustain that objection.

Mr. Hallam: May I have an exception?

COURT: Very well.

Q. You say you made this copy, Mrs. Wallace, of the letter attached to the deposition of Mrs. Wright?

A. Yes.

Q. Where was that written? Where did Mr. Smith write the letter in the first place, the original letter?

A. I don't know. I presume at his office.

Q. He didn't write it at the house?

A. No; he never wrote at the house.

Q. He brought it home with him on some occasion?

A. He gave it to me in the morning before he left the house.

Q. Was it written with pen or typewritten?

A. With a pen in his own handwriting.

Q. He gave it to you to copy?

A. He gave it to me to copy.

Q. Was it written on his office stationery?

A. I cannot be sure, but I think so.

Q. Did you copy it during the day and have it ready for him in the evening? Is that the way of it?

A. I believe so.

Q. What did he say when he asked you to copy it?

A. I think he said "Dewey, I wish you would copy this letter for me and put the copy away with some of Bess' bills."

Q. Some of Bess' bills?

A. Some of Bess' bills.

Q. Well, what were the bills to which he referred?

A. Well, they were bills that had been paid, bills that she had contracted and had been paid. He had asked me to put them away to keep them for him.

Q. Had you discussed with him the matter of that letter before he wrote it?

A. No.

Q. You didn't know he was going to write any such letter until he handed it to you?

A. No, I didn't.

Q. He said he wanted you to make a copy of it?

A. Yes.

Q. Was he in the habit of asking you to copy his letters?

A. No, he never asked me before.

Q. That is the only letter he ever asked you to copy in his life?

A. The only letter he ever asked me to copy in his life.

Q. Did you have any talk with him about the matter of asking Mr. Ailes to pay half the support of this complainant?

A. No.

Q. You knew nothing about that?

A. No, I knew nothing about it until he told me

that he had arranged to have Mr. Ailes come over to the house, and he wished to talk to him to see if he would help him take care—suggest some way of taking care of Bess and the children; and he wished me to be present when Mr. Ailes came to the house.

Q. Do you wish to be understood as saying, Mrs. Wallace, that Mr. Smith at that time asked Mr. Ailes to contribute half of the \$100 a month to the support of this complainant and the boys?

A. Yes.

Q. On his own motion—his own initiative?

A. It must have been so. I don't remember just how the conversation came about, but the result was that Mr. Ailes said he would contribute \$50 a month.

Q. Mr. Smith asked Mr. Ailes to contribute \$50 a month to the support of the complainant and her boys?

A. I don't know whether Mr. Smith asked him to contribute it or whether Mr. Ailes offered to. I don't remember about that.

Q. But Mr. Smith started the negotiations, did he?

A. Yes, he asked Mr. Ailes to come to the house to discuss the matter.

Q. Without any suggestion from any one, so far as you know?

A. Without any suggestion from any one, as far as I know.

Q. You knew at the time, did you not, Mrs. Wallace, that the complainant had not lived with Mr. Ailes since she was a very young child?

A. Yes.

Q. And her mother was divorced from Mr. Ailes?

A. Yes, I knew that.

Mr. Mercer: She was Mr. Ailes' own daughter, as you understood.

Mr. Hallam: Oh, yes; no question about that. That is all.

REDIRECT EXAMINATION.

Q. Was Miss Clarke in the room when you talked to Bess in the evening about the engagement? Was she in the same room?

A. Yes, she was.

Examination by the Court:

Q. I wish you would repeat again the conversation you had with Mrs. Price on the porch after she had come back and ascertained that the will had not provided for her.

A. Yes.

Q. I wish you would repeat the conversation there at that time.

A. I think I was on the porch and Bess came out, and she said to me, "Dewey, are you going to give me anything?" She said, "Dad has left me nothing. Are you going to give me anything?" And I said, "Well, why, Bess—why am I called upon to do this, if P. B. didn't think it best to leave you anything?" As I remember, she said nothing more. Then she said, "Well, Dewey, we are poor, and we have got to go back, and we have no money to go back with," and she said, "I will have to have some money to go back." And I said, "Very well, Bess, I will see that you have money to go back."

And I remember that she looked up and looked down the street, and she said, "I wonder when Ned is coming home." Oh, another thing: I said, "Bess, you don't consider this note that P. B. left you and Ned, which will pay off the indebtedness on your house." Of course, the note was evidently he had sent her the money to build the house with. And she said, "No." And I said, "that is not money—you don't consider the note money, really, do you, Bess?" And she said, "No, I don't."

Q. That is all the conversation you recollect?

A. That is all the conversation I recollect.

Q. That covers the whole conversation between you and her touching the will, and touching what you were to do, and what she was to do.

A. We had no conversation about the will. We had no conversation about a contract, because there was no contract. There was no understanding. She never mentioned the fact to me, as she says in her—as she says, that she asked me, that I told her I would send on as soon as the will was probated, I would send on her portion. There was never such a word mentioned. Not a word. I never dreamed of such a thing.

Q. (Recross) What was your understanding, Mrs. Wallace, as to Bess and her husband traveling from California to Minneapolis at that time, after the funeral?

A. I don't know. I gave it very little thought.

Excused.

Mr. Mercer: Now, I want to introduce this stipulation. It was made in lieu of evidence. It is short.

COURT: Very well.

Mr. Mercer: Stipulation as to evidence, for the purpose of preventing the taking of deposition of Mrs. F. C. Duncan, who resides at Fargo, and she is Mrs. Wallace's mother.

COURT: Is that your case?

Mr. Mercer: Yes, with this exception without waiving any on the grounds on which objections have been made to the testimony, we move to strike out the alleged conversation of the plaintiff with Peter B. Smith in which she claims she accepted the matter of agreeing to get a divorce, etc., upon the ground that it is entirely at variance with the provisions of the complaint herein; and second, I will make a similar motion as to the conversation with respect to the time the morning after the engagement, as she claims, and the conversation with Mrs. Smith which she alleges on the porch, as the plaintiff gives them, upon the ground that there isn't anything in this complaint based upon any theory of breaking up her family as between her and Donald MacLean; and when the court let that testimony in, as to that alleged first conversation, I understood—perhaps I understood wrongly, but I understood that counsel did not intend that for his main conversation. I objected to it at the time and the court overruled my objection. I think it is clearly lacking in all the elements, and certainly against public policy, and not within the elements of that complaint at all.

COURT: I will overrule the objection. This is an equity matter. It is not before a jury.

Mr. Mercer: Allow me to have an exception.

COURT: Yes, you may have an exception.

Mr. Mercer: Mr. Hallam, in order to avoid the necessity of calling witnesses to prove the fact, is it conceded that the home of P. B. Smith was conducted on a good plan by him?

Mr. Hallam: I don't know exactly what you mean by that.

Mr. Mercer: Some of your questions there went to intimate that you thought he might have had things to drink at card parties or something, and I thought you might mean to cast some slur maybe upon Mr. Smith, and I haven't any witnesses here; and other matters we don't want to go into.

Mr. Hallam: I don't think there is any occasion for that.

Mr. Mercer: Well, if you don't expect to make any claim that there is anything of that kind to Mr. Smith's discredit, that is all I want. In argument, do you propose to claim it?

Mr. Hallam: No, I don't propose to claim there was anything wrong with his home.

COURT: Have you any rebuttal, Mr. Hallam?

Mr. Hallam: I would like to recall the complainant for a very few questions in the way of rebuttal.

COURT: Very well.

ELIZABETH M. PRICE

Recalled in rebuttal.

DIRECT EXAMINATION.

Questions by Mr. Hallam:

Mrs. Price: Do you remember the occasion of the

engagement of the defendant and Mr. Smith, that evening, Miss Clarke being there?

A. Well, I don't just remember it until I had seen Miss Clarke again today. I hadn't seen her for a good many years, and she was not a personal friend of mine. I never had met her except through Mrs. Wallace at that time. But I knew she had been at our house—I had invited her over because she was a friend of Mrs. Wallace. And I had forgotten her until she was here in the court room this morning.

COURT: She was there, was she?

A. I am not quite sure that she was there that night or not. She was only there a few times; she was not a personal friend of mine; and I don't really know whether she was there that night or not. But I know that Mrs. Wallace and I were sleeping together. I was not on the couch. I was in the same bed with Mrs. Wallace when we had this conversation about my future relations between my Dad and myself.

CROSS EXAMINATION.

Questions by Mr. Mercer:

Do you remember that Mrs. Wallace and Miss Clarke were in the large bed, and that you went and sat down on the bed by them and talked about this matter?

A. No, I don't remember that.

Mr. Hallam: Objected to on the ground it is contrary to the evidence of the defendant.

Mr. Mercer: Oh, no.

Mr. Hallam: The evidence was that the complainant and the defendant were together.

Mr. Mercer: Oh, no. That is all, I think.

Excused.

COURT: Have you any other rebuttal?

Mr. Hallam: I think not, your Honor.

PLAINTIFF RESTS.

DEFENDANT RESTS.

*"In the United States District Court for the District
of Oregon.*

Elizabeth M. Price,

Complainant,

vs.

Marie Dewey Wallace,

Defendant.

Pursuant to the attached stipulation and the order made pursuant thereto, the above entitled matter came on for hearing before the undersigned at 916 McKnight Building, Minneapolis, Minnesota, on Friday, the 19th day of March, 1915, at 10 o'clock A. M., whereupon the undersigned took and subscribed the following oath:

"I, S. K. Phillips, do swear that I will faithfully and justly perform all the duties of the office and trust which I now assume as a Notary Public, authorized by the said stipulation and order to take and report the depositions of the witnesses on behalf of the defendant herein, to the best of my ability. So help me, God."

S. K. Phillips.

Subscribed and sworn to before me this 19th day of March, 1915.

H. V. Mercer, Notary Public,
Hennepin County, Minn.

My commission expires May 3rd, 1916."

H. V. Mercer appeared as attorney for the defendant and consented to a continuance of this proceeding until Saturday morning, March 20th, 1915, at 10 o'clock A. M., upon agreement of counsel for both parties.

Pursuant to the above adjournment and the stipulation hereto attached, the depositions of the following named witnesses, to-wit: George P. Wilson, George D. Rogers, Clarence A. Brown and J. W. Lauderdale were taken, commencing at 10 o'clock A. M. on March 20th, 1915, before me, S. K. Phillips, a Notary Public in and for Hennepin County, Minnesota; that each of said witnesses, before testifying, was duly sworn by me to tell the truth, the whole truth and nothing but the truth relative to the matters and facts involved in said cause.

A. B. Jackson and A. M. Higgins appeared as attorney for the complainant and H. V. Mercer appeared as attorney for the defendant; that said depositions were taken on behalf of the defendant.

GEORGE P. WILSON

Being first duly sworn, testified as follows:

Examined by Mr. Mercer.

Q. Your name is George P. Wilson?

A. Yes, sir.

Q. You reside in Minneapolis?

A. Yes, sir.

Q. You are an attorney at law?

A. Yes, sir.

Q. When you were admitted to practice in Minnesota?

A. October, 1862.

Q. And the most of that time you have practiced your profession ever since?

A. Yes, sir.

Q. You have held some public positions?

A. Yes, a few.

Q. What?

A. I was Attorney General of the State from 1874 to 1880, a member of the House of Representatives in 1872 and 1873, and State Senator for sixteen years ending the first of January, 1915.

Q. After your last term expired as Attorney General, you went up to Fargo, North Dakota, to practice law?

A. Yes, I went to Fargo in October, 1880.

Q. And you practiced at Fargo for some years?

A. Yes, seven years; at least, until July, 1887.

Q. Then you came back to Minneapolis?

A. Yes, sir.

Q. And you practiced law here after 1887 in the firm of Wilson & Van Derlip until 1902?

A. Yes, sir.

Q. Then your firm was Wilson & Mercer until just a few years ago?

A. Yes, sir.

Q. During the time that the firm was Wilson & Mercer, did you personally have to do with the proba-tion of the will of Peter B. Smith?

A. I did.

Q. When did you first become acquainted with Peter B. Smith?

A. He lived in Fargo for a year or two, according

to my best recollection—I should say he came to Fargo probably in 1884 or 1885—and I think he left there and came to Minneapolis about the same time that I did in 1887, although I am not certain about these dates; it was approximately the same time, approximately those dates.

Q. Did you become acquainted with him while he was in Fargo?

A. Yes, I knew him very well.

Q. After you came to Minneapolis did you have any business relations, any professional relations with him?

A. So far as I know, I attended to his personal business, whatever he might have, but my relations to him were more particularly in connection with his business relations to the St. Anthony & Dakota Elevator Company.

Q. You were the attorney for the St. Anthony & Dakota Elevator Co.?

A. Well, yes; in connection with Mr. Van Derlip and yourself.

Q. During the times the different firms were in existence?

A. Yes, sir.

Q. The St. Anthony & Dakota Elevator Company was a concern engaged in the grain and lumber business, fuel business, etc.?

A. Yes, in the Chamber of Commerce.

Q. Operating what is known as line elevators and line yards?

A. Yes, sir.

Q. Do you know what position Peter B. Smith held with that Company?

A. I think he was Secretary.

Q. And as to the management, do you know what relation he stood in?

A. I think he practically had control of the business of the St. Anthony & Dakota Elevator Company.

Q. In operating the Company?

A. Yes, sir.

Q. There was also associated with that Company in the next position, Mr. C. A. Brown, was there not?

A. He succeeded Mr. Smith.

Q. Do you remember that Mr. Brown was there?

A. Yes, he was there under Mr. Smith for a long while.

Q. Do you remember Mr. S. C. Cook, who was sort of a traveling representative for them?

A. Yes, I remember him very well.

Q. He was with the St. Anthony & Dakota Elevator Company for a number of years?

A. Yes, sir.

Q. Did you also know the complainant, whose name is Elizabeth Price?

A. Yes, I knew her by the name of "Bess" from the time she was quite a small girl.

Q. Did you visit back and forth at the Smith home?

A. To some extent.

Q. You knew her individually?

A. Now Mrs. Price?

Q. Yes.

A. Oh my! yes.

Q. I show you a document purporting to be the last Will and Testament of Peter B. Smith, under date of May 14th, 1902, and it is marked for identification "Defendant's Exhibit 1, S. K. P." I show you that document and ask you to look at the signature of Peter B. Smith and examine it. And then, before I ask you as to that specific instrument, I will ask you if you were acquainted with the signature of Peter B. Smith?

A. Very well, indeed.

Q. During these years you were doing business with him?

A. Yes, sir.

Q. I believe that Peter B. Smith at one time was President of the Chamber of Commerce of Minneapolis?

A. Yes, sir.

Q. And was also Vice-President of the Chamber of Commerce of Minneapolis?

A. That is my recollection.

Q. And we were attorneys for the Chamber during that period?

A. I think at that time Mr. Van Derlip and I were attorneys for the Chamber of Commerce.

Q. In May, 1902?

A. Yes, sir.

Q. But the firm of Wilson & Van Derlip severed in the fall of 1902.

A. November first, I think, yes.

Q. And it was after that that Peter B. Smith was President of the Chamber, wasn't it?

A. That is my recollection, yes.

Q. So that you have been familiar with his signature, generally speaking?

A. I have seen his signature a thousand times, I guess, and—

Q. You may tell us, if you know, whether the signature of that document is the signature of Peter B. Smith.

A. It is.

Mr. Jackson: You mean in your judgment?

Witness: It is, in my judgment.

Q. You know there was a Wm. B. Douglas who resided in Fargo?

A. Yes; I think he died—

Q. Four or five years ago?

A. Not so long ago as that, according to my recollection, but I may be mistaken.

Q. Did you ever know William Ballou?

A. I have no recollection of him. I don't know who he was.

Q. Did that document, Defendant's Exhibit 1, ever come into your possession during the time you were looking after the Smith affairs?

A. Well, it came into the possession of the firm, among our papers, I don't know how it got there, but—

Q. You remember it was there?

A. Yes, I recollect that it was among our office papers.

Mr. Mercer: Now, I want to identify the original Will of Peter B. Smith and I have it here from the Probate Court, Mr. Jackson, I have an exemplified copy of that, so I don't want to mark this Court record, but the

record may show we refer to the last Will and Testament of Peter B. Smith, under date of January 10th, 1906, which has attached to it the papers from the Probate Court showing the will and decree of probate, and without marking that, Mr. Jackson, I suppose the record may show that we present an exemplified copy of that to take the place of the original.

Mr. Jackson: That will be satisfactory.

Q. Calling your attention to the document which I will designate as Defendant's Exhibit 2, I will ask you if the signature to that document is that of Peter B. Smith, if you know?

A. Yes, sir.

Q. Do you know the signature of Mr. Brown on the right side, there?

A. Yes, sir.

Q. Is that the same Brown who was with Mr. Smith in the St. Anthony & Dakota Elevator Company?

A. Yes, sir.

Q. Do you remember Mr. Cook's signature?

A. No, I couldn't identify Mr. Cook's signature, although at the time I was quite familiar with it, as he frequently visited the office.

Q. Did you, as Mr. Smith's counsel, prepare that will?

A. I did.

Q. During any of Mr. Smith's lifetime, in connection with the preparation of that will or otherwise, was your attention ever brought to any contract, or claim of any contract, of Mrs. Price, or "Bess," as you call

her, in the estate of Mr. Smith—during Mr. Smith's lifetime?

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant.

A. I have no recollection of any such thing.

Q. Did you have any talk with Mr. Smith in which he told you anything about there being any arrangement that Bess should have any interest in his estate? Did you ever hear of that from him?

Mr. Jackson: The same objection.

A. Nothing further than a certain note that Peter B. Smith had taken for money loaned to Mrs. Price.

Q. I have had marked as "Defendant's Exhibit 3, S. K. P.," what purports to be a letter from Ned Price to P. B. Smith under date of 11-1-06. Below that, what purports to be a memorandum by P. B. Smith on the same page of the same paper, marked "Defendant's Exhibit 4, S. K. P." and also a document on the reverse side of the sheet containing Exhibit 5, purporting to be a receipt by Elizabeth Smith Price and Edwin J. Price, for a promissory note under date of September 13, 1907; also a document on separate paper with a receipt containing the words in Exhibit 4, which is marked "Defendant's Exhibit 6, S. K. P." and directing the witness's attention to these documents, I will ask you, General, if you have seen those before, and if so, where?

A. Oh, yes; I saw them and they were in my possession—or our possession—in my particular possession.

Q. During the time that you probated the estate of Peter B. Smith in 1907, say during September from the

date that Exhibit 5 bears, were they in your possession?

A. I think so; yes, sir.

Q. You may look at Exhibit 4 and tell us, if you know, in whose handwriting it is?

A. Exhibit 4 is in the handwriting of Peter B. Smith and his signature is attached to it.

Q. And on the instrument marked "Defendant's Exhibit 5, S. K. P.," I see as a witness "George P. Wilson." Is that your signature?

A. That is my signature.

Q. Made at the date of that instrument?

A. Yes, sir.

Q. And on Defendant's Exhibit 6, I show you the words "George P. Wilson" and ask you if that is your signature, also made at the date of that instrument?

A. It is.

Q. I will ask you to examine Defendant's Exhibit 5 and tell us if you had in your possession at that time the note, a copy of which purports to be included therein?

A. I did have.

Q. Did it come into your possession in the handling of that estate, with the other paper?

A. It did.

Q. Now, I notice that Exhibits 5 and 6 contain the signatures of Elizabeth Smith Price and Edwin J. Price, as well as having your name as a witness. Were those signatures signed by those two people at the time you witnessed them?

A. They were, in my presence.

Q. You may tell us what took place at the time those instruments, Exhibits 5 and 6, were signed.

Mr. Jackson: Objected to as immaterial and irrelevant.

A. They came to my office in the Security Bank Building, and the note was delivered and the receipts taken. That is all that I recollect.

Q. In accordance with those receipts as specified?

A. The receipts we refer to were taken at that time.

Q. Was there anything said by Mrs. Price at that time about claiming any further interest in Mr. Smith's estate?

Mr. Jackson: Objected to as immaterial and irrelevant.

A. I don't recollect of anything of the kind.

Q. Do you recollect any expression of dissatisfaction or anything of that sort?

Mr. Jackson: The same objection.

A. I do not.

Q. If there had been do you think you would have recollected it?

A. If there had been anything specific, I think I would have recollected it, but I don't recall any expression of dissatisfaction. In fact it was a very simple thing, simply delivered the note and took the receipts. I remember of having a little preliminary conversation with "Bess" as I call her, and as I know her, but that was simply in reference to our former acquaintance. I don't know that I ever saw Mr. Price before; I don't recollect that I did.

Q. Did you at any time during the probation of that estate, ever in any way have your attention brought to any claim of the complainant, Elizabeth Price?

Mr. Jackson: Objected to as immaterial and irrelevant.

A. I might have had, but do not recollect it.

Q. When is the first recollection you have of ever having heard of any claim of any kind outside of this note?

Mr. Jackson: Objected to as immaterial and irrelevant.

A. When the suit was brought.

Q. After the estate was probated?

A. Yes, sir.

Q. So that, as attorney for the estate in the probate, you did not know of any claim at all?

Mr. Jackson: The same objection.

A. I don't recollect of anything of that kind.

Mr. Mercer: I will offer Defendant's Exhibits 2, 3, 4, 5 and 6, each in evidence separately. Exhibit 2 is the will as probated in Hennepin County, and of Exhibit 2 I will furnish an exemplified copy from the Probate Court for the trial and attach a copy to the deposition, if that is satisfactory.

Mr. Jackson: I shall object to that as incompetent, immaterial and irrelevant.

Mr. Mercer: I have not identified the signature of "Ned" or his handwriting, but I think it is his and I can do that at the trial if there is any question on that score. Do you make any point of my offering them?

Mr. Jackson: No, but I object to those papers in relation to the Ned Price note as immaterial and irrelevant.

Q. Were you acquainted with the business reputa-

tion of Peter B. Smith, that is, his reputation as to business integrity, during the years 1900 and 1902, 1904 and 1906 down to the time of his death?

A. I have never heard anything against his business integrity. In other words, his reputation for business integrity was good.

Q. You were acquainted with it, as I understand?

A. Yes, sir. . .

Q. And what was that reputation as to his business integrity?

Mr. Jackson: Objected to as immaterial and irrelevant.

A. (No answer.)

Q. I will now ask you what that reputation was.

Mr. Jackson: Objected to as immaterial, incompetent and irrelevant.

A. It was good.

Q. You knew Mrs. Smith, who is now Mrs. Wallace, also?

A. Yes, I knew her. .

Q. And during the time this estate was probated?

A. Yes, sir.

Q. She was here in Minneapolis a good share of the time?

A. Yes, sir.

Q. And she was the executrix of that estate?

A. Yes, sir.

Q. And you were doing the business for her?

A. Yes, sir.

CROSS-EXAMINATION.

Examined by Mr. Jackson:

Q. General Wilson, did you visit at the home of Peter B. Smith after the date of his marriage to Bessie's mother, I think that was in 1893?

A. I think so.

Q. Did you visit Mr. Smith there quite often?

A. No, no; not quite often.

Q. I think I have understood that Mr. Smith was quite in the habit of having some of his gentlemen friends in there to card parties or something of that kind; did you ever visit him on such occasions?

A. I have no recollection of—

Q. Well, did you visit him after the death of Bessie's mother?

A. I couldn't say about that; I couldn't say. I remember of being at their home, I think, in company with Mrs. Wilson, possibly more than once, but not often.

Q. Do you remember being there at all, General Wilson, after the birth of either of Bessie's children?

A. I do not.

Q. You knew, as a matter of fact, that she did have two children by her first marriage?

A. I understood so, yes.

Q. But you don't recall being at Mr. Smith's house and seeing the children there?

A. No, I do not.

Q. Prior to Bessie's marriage to Dr. MacLean, do

you know whether or not she was commonly called Bessie Smith?

A. Prior to that?

Q. Yes, prior to her marriage to Dr. MacLean, prior to Bessie's marriage?

A. I think I knew her as Bessie Smith.

Q. And that was the name by which she went, as far as you know, from about the time of Mr. Smith's marriage to her mother until she herself married Dr. MacLean?

A. That is my recollection.

Q. Did you know, General Wilson, as a matter of fact, whether from the time of the death of her own mother, which occurred in June, 1900, Bessie, the complainant in this action, made her home with Peter B. Smith until some time after his marriage to the defendant?

A. I think so.

Q. I understand that you are not able to recall with certainty whether you personally visited him at his house during that period, or not?

A. No, I cannot recall.

It is stipulated and agreed by and between the parties hereto, by their respective counsel, that the reading and signing of said deposition by the said witness is hereby expressly waived.

GEORGE D. ROGERS, being first duly sworn, testified as follows:

Examined by Mr. Mercer:

Q. Your name is George D. Rogers?

A. That is my name.

Q. How long have you lived in Minneapolis?

A. Forty years.

Q. You were connected with the Chamber of Commerce at one time?

A. Yes, sir.

Q. In what capacity?

A. Secretary.

Q. For how long a time?

A. Eleven or twelve years; I don't remember exactly.

Q. And you have also been connected with the Market Record Company?

A. I have.

Q. Publishing the reports of the Chamber?

A. Yes, sir.

Q. You are connected with that Company yet?

A. I am.

Q. Did you know Peter B. Smith in his lifetime?

A. I did.

Q. Did you know him intimately in a business way?

A. Why, in a way, yes. I never did much business personally with him.

Q. Peter D. Smith was on the Board of Directors of the Chamber of Commerce for some time while you were Secretary, wasn't he?

A. He was.

Q. State whether or not it is a fact that he was one of the prominent grain men and so considered here?

A. He was.

Q. I suppose, Colonel, that you knew Mr. Smith's reputation for business integrity?

A. I did.

Q. During the years around 1900 and subsequent to that time?

A. Yes, sir.

Q. You may state what it was.

Mr. Jackson: Objected to as immaterial and irrelevant.

A. His reputation was good.

Q. You are referring to his reputation for business integrity, I suppose?

A. I am.

Q. The St. Anthony & Dakota Elevator Company was one of the larger elevator companies here, wasn't it?

A. Yes, sir.

Q. And he was manager of that for some years?

A. He was.

(Cross-examination waived.)

It is stipulated and agreed by and between the parties hereto, by their respective counsel, that the reading and signing of said deposition by the said witness is hereby expressly waived.

CLARENCE A. BROWN

Being first duly sworn, testified as follows:

Examined by Mr. Mercer:

Q. Your name is Clarence A. Brown?

A. It is.

Q. You live in Minneapolis and have been there a good many years?

A. Yes, sir.

Q. You are at present Manager of the St. Anthony & Dakota Elevator Company?

A. Yes, sir.

Q. And were with the Company during all the time Mr. Smith was Manager?

A. During all the time.

Q. You are familiar with his signature and know it?

A. Yes, sir.

Q. I show you this document, headed "Last Will and Testament" under date of January 10th, 1906, from the Probate Court files of Hennepin County, Minnesota, and ask you to look at that signature and see if that is the signature of Peter B. Smith.

A. It is.

Q. Under the witnesses on the left-hand side, I see the name C. A. Brown. Is that your signature?

A. Yes, sir.

Q. And S. C. Cook's?

A. Yes, sir.

Q. You know Mr. Cook and his signature?

A. Yes, sir.

Q. Did you and Mr. Cook sign that at the time Mr. Smith signed the Will?

A. Yes, sir.

Q. Do you remember what conversation took place at the time, if any?

A. No conversation, as I recall; a simple statement from Mr. Smith that that was his will and he asked us to witness it.

Q. And you did witness it then?

A. We did.

Q. You knew Mr. Smith's reputation for business integrity?

Mr. Jackson: Objected to as immaterial and irrelevant.

A. Yes, sir.

Q. What was it?

Mr. Jackson: The same objection.

A. The very best.

Q. And Mr. Cook died recently?

A. This last fall or winter.

It is stipulated and agreed by and between the parties hereto, by their respective counsel, that the reading and signing of said deposition by the said witness is hereby expressly waived.

J. W. LAUDERDALE

Being first duly sworn, testified as follows:

Examined by Mr. Mercer.

Q. You live in Minneapolis?

A. I do.

Q. How long have you lived here?

A. Thirty-three years.

Q. You were acquainted with Peter B. Smith in his lifetime?

A. Yes, sir.

Q. Visited back and forth in his home?

A. Very frequently.

Q. Were you close friends, you and Mr. Smith?

A. Yes, we were.

Q. Did you in the course of the later years of Mr.

Smith's lifetime, have any conversation with him about the matter of the complainant and her conduct with respect to the household affairs, etc., meaning by that the girl they called "Bess"?

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant.

A. Yes, sir.

Q. Now, did you have more than one conversation about that, that you recollect?

A. No, sir, I had but one.

Q. Who was present at that conversation?

A. Mr. P. B. Smith, Mrs. Smith, my wife and myself.

Q. The Mrs. P. B. Smith to whom you refer is the Mrs. Smith living at the time of his death and who is now Mrs. Wallace?

A. Yes, sir.

Q. Mr. Smith, I believe, had been married three times?

A. Yes, sir.

Q. You know Mrs. Price, or "Bess" as they call her?

A. Yes, sir.

Q. Did you know her when she was Mrs. Donald McLain?

A. Yes, sir.

Q. When she was Mrs. Price?

A. I have known her, but have not met Mr. Price?

Q. You knew there were two boys?

A. Yes, sir.

Q. You may tell us as nearly as you can, where that conversation was?

A. In the dining-room of Mr. Smith's home on the corner of 16th St. and First Avenue South.

Q. And you can give us about the year that it was?

A. About the year—that is going to be a difficult proposition. I cannot recollect the year, as it wasn't fixed in my mind, but it was the time that he was—it was since he was married to the present Mrs. Smith. They previously lived in the house across the street, almost directly across the street where the first Mrs. Smith died, and after he married the present Mrs. Smith they lived on the opposite side of the street on the corner; 105 I believe was the numbr.

Q. Do you remember how you happened to be in the dining-room at that time?

A. Yes, it was Sunday evening. He phoned over to the house and asked Mrs. Lauderdale and myself to go over and take lunch.

Q. You were there Sunday night for lunch?

A. Yes, sir.

Q. While you were at the table, this conversation took place?

A. Yes, sir.

Q. You may go ahead and tell us how it arose?

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant; as it was not in the presence of complainant, and is hearsay.

A. (No answer)

Q. I suppose, of course, you took no written notes

of that conversation, it was just an oral conversation?

A. An oral conversation.

Q. Now, you may tell us how that conversation came about and what your recollection of it is.

A. Well, Mr. Smith, after we had been sitting at the table for some little time, Mr. Smith said, "Mr. Lauderdale, there is something I want to talk to you about that nobody knows anything about; I haven't talked to anybody about it and it is simply setting me nearly crazy; and that is in regard to the actions of Bess and the reports that she is circulating in regard to my treatment of her. I think you know the family well enough and know me well enough, to know that I have done everything that I possibly could for Bess, and for the children, and it has got to the point where I must draw a halt." That was, if I recollect rightly, it was after she had separated from Donald. I think I am correct about that, and he went on to relate the circumstance. He said: "I told her, now Bess, I will pay the house rent and will give you a certain amount of money, which will be liberal, for the maintenance of the house and you pay the bills and take care of the house just the same as though you were in absolute charge of the house, which I want you to be, and you pay the bills and I will give you an allowance each month." If he stated that amount, I cannot recall the exact amount, but if I remember rightly it was between \$200.00 and \$300.00 a month that he gave her a check for and he supposed everything was running along smoothly, until two or three months after that bills began to come to him for unpaid grocery bills, market bills, meat and other bills which she was supposed

to have paid from this allowance that he gave to her. He said, "I paid them and protested to her for an explanation as to why she hadn't paid them. She gave some excuse, I don't recall what excuse she gave to me, but in my opinion it is largely on account of Donald's habits." He said he knew that Donald was gambling and that she had on two different occasions taken her mother's (that was her own mother's, not the present Mrs. Smith's) coat, a diamond ring and several other articles and pawned them to raise the money to give to Donald; that she had done that twice, and, says he, "It has got to that point where I have just simply got to stop; I will not submit to it any longer. She has told different parties in regard to what I was doing and what I was not doing, and it certainly is not fair to me that she should circulate those stories, and I have no defense at all. The whole gist of the matter is that I am going to stop; I am not going to do anything more for them. As long as the children are in my house, I will take care of them, but further than that I must absolutely stop." He sat there and the tears ran down his face as he was telling it. Now, that is about the conversation. It was simply to relieve his own mind apparently, have somebody else know the condition that existed, rather than keep it shut up within himself. He was not a communicative man, and it is the only time I ever heard him mention a thing pertaining to Bess or his family matters.

Mr. Jackson: I move to strike out that part of the answer which is not responsive to the question that was put and does not purport to repeat anything that Mr. Smith himself said.

Q. You were well enough acquainted with Mr. Smith to know whether he was a reticent man, or talked about his affairs generally?

A. I considered him a very reticent man.

Q. This was the only time you heard him discuss the question?

A. The only time.

Q. Possibly Mr. Jackson's motion might relate to the question of the way Mr. Smith appeared at the time, and I will ask you how he did appear at the time of that conversation.

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant.

A. He appeared very much wrought up and hurt.

Q. Was that the time you say he cried?

A. Yes, sir.

Q. Do you recall whether there was anything said by him about whether or not it was advisable to give her further money?

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant.

A. Yes, I think there was; he said "It isn't justice to me nor to her to allow her to have money that she can spend according to her ideas. She is simply extravagant to the limit, and it isn't safe for anybody to supply her with money calculating to meet her requirements, as it cannot be done," or words to that effect. That is practically the sentiment of it.

Q. Do you remember what time in the year that was?

A. I cannot recall, I know we only lived about three

blocks away from them and my wife and I had walked over there Sunday evening, as we did frequently.

CROSS EXAMINATION.

Examined by Mr. Jackson.

Q. The main thing, Mr. Lauderdale, as I understand you, that Mr. Smith complained of and said he felt he ought to tell you about, was the fact that Bessie had on two or more occasions given money to her husband to held him out of some gambling scrapes, which Mr. Smith had given her for household purposes; is that it?

A. That was what brought the matter up; I presume that had all bills been paid, he would have had no occasion to criticize her, if she didn't exceed the limit that he allowed her for household expenses.

Q. About how long would you say this conversation took place after the marriage of Mr. Smith to his third wife?

A. I can't tell; of course not a great while. It may have been—I should say it was within a year. I can't even recall the year that he was married.

Q. Did you know, Mr. Lauderdale, that shortly after the marriage of Mr. Smith to his third wife, Bessie took an engagement on the stage and was away from home some eight or nine months in that connection?

A. Yes, sir.

Q. Would it be your recollection that it was during that period this conversation occurred?

A. My recollection is that it was prior—I can't recall whether it was prior—I think it was after she ac-

cepted her engagement. I think so, although I am not positive—after she went on the stage.

Q. Now, if I understood you correctly, the main reason given by Mr. Smith for his mentioning these things to you was that he felt it was only justice to him that some of his friends should know that Bessie was using money that ought to have been used for other purposes, to help her husband out of some of his gambling scrapes?

Mr. Mercer: Objected to as not in accordance with the statement of the witness.

A. (No answer.)

Q. Isn't that the substance of it?

A. No, I don't think it was. As I remember it now, this explanation of his, or his statement to myself and wife, was not brought out immediately after the spending of his money recklessly by Bess, but after an accumulation of instances or things that had occurred that brought him to the point where he had reached a limit as to what he was willing to do for her. I had never known prior to that, as to this pawning of the jewelry or anything in regard to the household expenses, and it had occurred some time prior.

Q. That was something that had occurred during Bessie's mother's lifetime?

A. No, sir; after her own mother's death and while she was acting as his housekeeper.

Q. I am trying to get at the approximate date of this conversation.

A. If I knew when they left—I don't know as to the death of Mrs. Smith, whether it was the same year,

but think it was, they gave up the house they lived in and moved across the street; but as to dates, I cannot recall them even approximately.

Q. Did you see Mr. Smith during the summer months which followed the death of Bessie's mother, who died in June, 1900?

A. Yes, I saw him frequently.

Q. Bessie and her husband, Dr. MacLean, were living with Mr. Smith during that summer, were they not?

A. Yes, sir.

Q. And Bessie had at that time one boy, a little child about three or four months old—the child was born in March, 1900?

A. Yes.

Q. Now, did you know anything of the circumstances of Dr. MacLean's leaving Minneapolis that fall?

Mr. Mercer: Objected to as not proper cross examination.

A. I knew nothing about it only what Mr. Smith told me, and that was—

Q. When was it he told you?

A. It was after he went away. Whether it was the same evening or not, I don't know. At this time he told me, he said, "I have got completely disgusted with his actions and I told him, 'Now, Donald, there is one thing you have got to do; you have got to leave this house. I will buy you a railroad ticket to any place you want to go, it doesn't make any difference where it is; you name the place and I will give you transportation and money enough to pay your other expenses until you

get there, but I have stood it here with you just as long as I can."

Q. Now, what is your best recollection as to whether this statement that you have just repeated was made by Mr. Smith in the same conversation as the other statements which you made before?

A. My recollection is that the statement in regard to Donald's going away was made prior to statements he made in regard to the matters pertaining to Bess. When Donald went away, I think it was only a short time afterwards—I guess it was generally known that Donald was inclined to be sporty and that when he went away the cause was known to others outside of the family, and that he got to that point where he was tired of it and sent him away.

Q. Now, Donald MacLean left Minneapolis in the fall of 1900. Peter Smith didn't marry his third wife until May, 1902, and it was some time after that, if I understand you right, that Mr. Smith called you over to his house for the purpose, or in part at least, of making these complaints to you about what Bessie had done to help her husband out of gambling scrapes over two years before. Is that right?

A. It was after Donald went away and of course after he was married to the present Mrs. Smith.

Q. Did Mr. Smith say anything to you either at that time or any other, about his insisting on Bessie getting a divorce from Dr. MacLean?

Mr. Mercer: Objected to as not proper cross-examination, irrelevant and immaterial in this case.

A. I don't recall that he did. I don't recall that he

ever made a demand—that he ever told me that he made a demand to Bess that she should get a divorce from Dr. MacLean. I don't recall it at all.

Q. You think it was shortly after the death of Bessie's mother that Mr. Smith moved from one house to another?

A. I don't know. They didn't live a great while—whether it was before he had married the present Mrs. Smith and he took her immediately to the house across the street, or not, I don't recall; or whether they lived for a time in the house where the second Mrs. Smith had died, or not, I cannot recall.

Q. I will ask you if you can give us the location of those two houses; if you remember the street and numbers, I would be glad to have you give them, but if not, describe as well as you can.

A. The house that he lived in when the second Mrs. Smith died, was the third house from the corner of First, or Marquette Avenue and facing south on 16th Street. The house that he moved to was a house almost directly opposite, only a little nearer to the corner of First Avenue. The number of that house was 105 16th Street East. I think that is the number, the house does not front on First Avenue.

Q. You don't happen to remember the number of the first house?

A. No, I don't.

Q. This conversation that counsel asked you about and which you testified to first, are you able to say whether that was before or after Bessie's marriage to Price out in California?

A. It was prior.

Q. What was prior?

A. It was prior to her marriage with Price.

Q. Was Bessie living at home at that time, with Mr. Smith in his house, at the time of this conversation?

A. The children were there, and if my recollection is correct—I won't be positive as fourteen or fifteen years is a good while to go back—my recollection is that Bessie was at that time with this theatrical company. I think I am right about that, she was not at home at that particular time, but the children were there.

Q. Now, Mr. Lauderdale, Mr. Smith didn't make any complaint to you, did he, about Bessie's extravagance or conduct in any respect during the period that she was with the theatrical company?

A. No, I don't recall that he did.

Q. Isn't this the fact: That during the time that she was with the theatrical company, which I understand to have been eight or nine months, that during that time Mr. Smith sent her an allowance of \$15.00 a week in addition to whatever she received from the theatrical company? Isn't that your understanding?

A. I don't recall.

Q. But at all events, there was nothing in what Mr. Smith said to you to lead you to infer that there was any new cause for complaint on the score of extravagance or any other score, which had come up since she had gone to earn something of a living with this theatrical company, was there?

A. Mr. Smith was a very generous man and as long as Bessie was reasonable, he was more than willing—

Q. I hardly think that is responsive to the question. Please read the question.

(Question read.)

A. I don't think there was.

Q. There is no way by which you can locate or fix the date of this conversation any closer than you have already done, is there?

A. I don't think there is.

Q. And if I understand you right, it might have been at any time within a year or more after the marriage of Mr. Smith to the present defendant; is that right?

A. I would fix the time then, as between the time that she went on the stage and prior to her leaving it.

Q. Then, if I understand you, it would be your best recollection that that conversation took place while Bessie was with the theatrical company?

A. I think it was; to the best of my recollection, I think it was.

RE-DIRECT EXAMINATION.

By Mr. Mercer.

Q. Mr. Lauderdale, you have spoken of Marquette Avenue and you have spoken of First Avenue. At the time that Mr. Smith lived down there, the avenue that you now designate as Marquette Avenue was named First Avenue South?

A. Yes, sir.

Q. You may state whether or not Mr. Smith, in his conversation laid stress upon the fact that he had heard

of stories Bess was telling about him just previous to that?

Mr. Jackson: Objected to as not proper re-direct examination and leading; also as irrelevant, immaterial and incompetent and hearsay.

A. (No answer.)

Q. Tell us what the fact is of how he spoke of hearing things that she had been saying, that he thought were not just to him?

A. The occasion for that remark was—he had invited us to go over there for lunch as he wanted somebody outside of their own family to know the conditions and to be able to fully understand any stories that might come to them that Bess was telling about her treatment at his home.

Q. I believe I didn't ask you the nature of your business. You are with the Yale Realty Company?

A. Yes, sir.

Q. And you had known Peter B. Smith, I suppose, for a good many years?

A. Yes, I had known him for a great many years.

Q. Do you remember of having any conversation with Mr. Smith after Bess went West, as to whether or not he was contributing to her support then?

Mr. Jackson: Objected to as immaterial and irrelevant and leading.

A. Yes, he did.

Q. Now you may tell us what that conversation was.

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant.

A. He told me that he had made an arrangement to send Bess and the boys West, they wanted to go West to her father, who was to contribute \$50.00 a month and he was to contribute \$50.00 a month for the support of Bess and the children. He had made arrangements with her father to each contribute \$50.00 a month toward the support of Bess and the children, and he said they sent them West and he said that from some misfortune that her father had, he wasn't able to contribute his portion of the money, \$50.00 a month, but that he had supplied the whole amount; he had sent Bess a check for \$100.00 a month himself and did so up to the time that Bess had married Price; and he said after she had married, he felt as though his obligation had ceased.

Q. And this was after she had married Price that this conversation took place?

A. That was after she had married Price.

RE-CROSS EXAMINATION.

By Mr. Jackson:

Q. About when was this conversation?

A. Can't recall the date; it was after she married Price.

Q. I think you used the expression that "they," which I infer meant Bessie and her children, wanted to go West?"

A. Yes, sir.

Q. Now, are you confident that that is the way he put it? Was it not that he wanted them to go West?

A. My recollection is that my statement was correct; that they wanted to go West.

Q. You were quite intimate, as I understand it, at Mr. Smith's home after his marriage to this last wife. Now, I will ask you first, at the conversation that you first testified to on the Sunday evening that you were asked over there, what part did Mr. Smith's new wife take in that conversation?

A. No part.

Q. She didn't say anything at all?

A. No, sir.

Q. You had, however, been in the habit of visiting Mr. Smith's home during the nearly two years after the death of Bessie's mother and during which time Bessie was acting as his housekeeper?

A. Yes, sir.

Q. And during all of that time Mr. Smith had never made any complaint to you about Bessie's conduct or anything about it?

A. No.

Q. On the contrary, during all of that time he seemed to be fond of her, wasn't he?

A. He always was.

Q. And treated her really as he would treat his own daughter?

A. Yes, sir.

Q. And was fond of the children?

A. Yes, exceptionally so.

Q. And it was only after his marriage to his new wife that this old matter of two or three years before was raked up and made the subject of special conversation with you?

Mr. Mercer: Objected to as calling for the conclu-

sion of the witness and not proper cross examination, and an attempt to twist the meaning of the testimony.

A. (No answer.)

It is stipulated and agreed by and between the parties hereto, by their respective counsel, that the reading and signing of said deposition by said witness is hereby expressly waived.

Adjourned until March 27th, 1915, at 10 o'clock A. M.

March 27th, 1915, 10 o'clock A. M. The hearing in above matter set for this hour, is continued until March 29th, 1915, at 10 o'clock A. M., by consent of counsel for parties hereto.

March 29th, 1915. 10 o'clock A. M. The hearing in above matter set for this hour, is continued until April 10th, 1915, at 10 o'clock A. M., by consent of counsel for both parties.

Deposition of Mrs. Anna Wright, taken before me, S. K. Phillips, a Notary Public in and for Hennepin County, Minnesota, April 10th, 1915, pursuant to the annexed stipulation.

MRS. ANNA WRIGHT, being first duly sworn, testified as follows:

Examined by Mr. Mercer:

Q. What is your name?

A. Anna Wright.

Q. You live in Minneapolis now?

A. Yes, I have been here four years.

Q. You were the wife of Mr. E. A. Wright?

A. Yes, sir.

Q. In 1902 and 1903, I suppose?

A. Yes, sir.

Q. Where did you live during that time?

A. Minneapolis.

Q. In 1902 and 1903?

A. We lived in Canton, Ohio.

Q. How long did you live there?

A. We were there ten years, but Mr. Wright's business called him other places very often. We were in Kansas City a while, and also in Memphis.

Q. So that the residence, though, in Canton, was about ten years?

A. Yes, sir.

Q. Were you related in any way to Peter B. Smith's wife, who was the mother of Elizabeth Price?

A. His wife was my youngest sister.

Q. That is, Mrs. Price's mother was your youngest sister?

A. Yes, my youngest sister.

Q. Did you know Peter B. Smith?

A. Yes, sir.

Q. Did you know him along during the whole time that he was married to Bess's mother?

A. Yes, sir. He sent for me, I was here when my sister passed away.

Q. Now, since Mr. Smith died, your husband died, did he not?

A. Yes, sir.

Q. Do you know what became of such letters as were preserved by Mr. Wright, to the time of his death?

A. I don't know. After his death, when the home

was broken up—you usually destroy those things because you think you will never want them again—I had his brother help me destroy a great many papers, thinking I would never want them again.

Q. I have made inquiry before of you, to see if you knew where there was a letter under date of February 16th, 1903, from Mr. Smith to Mr. Wright about the care of Bess and the children. Do you know anything of where such a letter is now?

A. I have no recollection; I remember of his writing such a letter.

Q. You remember Mr. Smith wrote such a letter?

Mr. Jackson: I move to strike out the last answer as not responsive to the question.

Q. State whether or not you know whether Mr. Wright received a letter from Mr. Smith in regard to Bess and the children.

Mr. Jackson: The last part of the question I object to as calling for the contents of a written instrument and not the best evidence.

A. (No answer.)

Q. Do you remember that Mrs. Price, before she married Mr. Price, was on the stage for something like a year?

A. Yes, sir.

Q. And do you remember whether or not about the time she was on the stage, your husband received a letter from Mr. Smith respecting her?

A. I remember we received a letter asking us to—

Mr. Jackson: One moment, please; I object to any testimony being given as to the contents of the letter,

it is not responsive to the question, is incompetent and not the best evidence.

Q. The question I asked first was whether or not you remembered his receiving a letter from Mr. Smith about that time.

A. Yes, sir.

Q. Through the mail, of course, I suppose?

A. Yes, sir.

Q. Now, are you able to tell us whether that letter is still in existence—the original; do you know where it can be found?

A. No, I do not.

Q. What is your best judgment as to whether any letters written to Mr. Wright were preserved after you moved?

Mr. Jackson: Did you ask her as to her best judgment?

Q. I want you to tell us what your own best knowledge is as to whether any of Mr. Wright's letters which were in existence at the time he died, were preserved.

Mr. Jackson: Unless that question calls for an answer as to whether the witness does or does not know—of course that I don't object to. If you ask her whether she knows whether the letters have been destroyed or not, I will not object to that; but any conjecture or guess on her part as to the destruction, I should object to.

Q. That question has become a little confused. I will ask you another one, Mrs. Wright. Do you know of any letters that Mr. Wright received during his life-

time which have been preserved—letters from Mr. Smith which have been preserved to this time?

A. No, sir.

Q. When the letters were destroyed, after your husband's death, which were destroyed, did you save out any letters that you found?

A. No letters at all.

Q. Now, I will ask you to tell us whether or not you corresponded frequently with Mr. Smith—whether Mr. Wright corresponded frequently with Mr. Smith before he died?

A. Quite often.

Q. And so far as you know, are any of those letters now in existence?

A. No, sir.

Q. Do you remember a letter written by Mr. Smith to Mr. Wright respecting the care of Bess and the children?

A. Yes, sir.

Q. Do you know about when that was, about what time, with respect to the time Bess was on the stage?

A. It was about the time that Bess went on the stage.

Q. Do you recollect some of the substance of that letter, or any of the substance of it?

A. It was after Mr. Smith, my brother-in-law, married Mrs. Wallace, now, and she was not fond of children and he said that she preferred not to have the children around and wanted to know if Uncle Ed and Aunt Anna wouldn't take those children and care for them.

Q. Referring to Mr. Wright and yourself?

A. Yes, sir.

Q. Do you remember whether or not Mr. Smith came down to Canton to talk with you and your husband?

A. Well, he visited us once but not to talk about things of that kind.

Q. And you didn't have any conversation with him?

A. No.

Q. Did he say anything about whether or not—in that letter—anything about whether he was willing to pay for caring for the children and Bess?

A. Yes, he said he would send us a check for so much a month, he would hire a maid for them—a nurse for the children—and if there were any expenses he would cover them and just to let him know.

Q. Was there anything said about what it was costing him then, do you remember?

A. I don't remember.

Q. Do you remember anything else that was in that letter?

A. No, sir.

Q. You don't remember any conversation you had with Mr. Smith about the matter of the care of Bess and the children?

A. No, sir.

Q. Did you and your husband take the children?

A. No.

Q. Why?

Mr. Jackson: Objected to as incompetent, imma-

terial and irrelevant and calling for the conclusion of the witness.

A. My health would not permit.

Q. Did he also ask you to take care of Bess, do you remember?

A. No, sir.

Q. You don't remember about anything he said about her?

A. No.

Q. If you should see a copy of that letter, do you think if you read it over it would refresh your mind so that you would know whether it was the substance, or the same thing, or a copy of a letter which purported to be that?

A. I might.

Mr. Jackson: As I understand, Mr. Mercer, the purported copy shown the witness is in the handwriting of Mrs. Wallace, the defendant in this action, and it is presented to the witness on the theory that it is a copy made by Mrs. Wallace of an original letter written by Mr. Smith to Mr. Wright. Is that correct?

Mr. Mercer: That is my understanding. I haven't inquired of Mrs. Wallace personally or shown her that letter. I know that letter has been in our possession since the time the case was up before, and I am advised here that it looks like her handwriting. My understanding is that she copied it.

Mr. Jackson: Is there a question before the witness now?

Mr. Mercer: No, there is not. The envelope which I have shown is marked Defendant's Exhibit 7 and the

letter is marked Defendant's Exhibit 8, and I expect to better connect those up at the trial so as to show whose handwriting it is and whether or not it is a correct copy.

Q. Mrs. Wright, you have read this letter which I have shown you, marked on the corner Defendant's Exhibit 8, just a few moments ago. I will ask you if you are able to tell whether or not that is a copy of the letter to which you referred to in your testimony?

A. Will you repeat that again, please?

(Question read)

A. Well, I don't know whether it is a copy or not. It is hard to tell.

Q. Did you read the letter that you testified about, the one that came from Mr. Smith to your husband about the children?

A. About the children—sending the children?

Q. Yes.

A. Yes.

Q. Do you remember reading any letter that came to your husband from Mr. Smith that was substantially the same as this one you hold in your hand, Exhibit 8?

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant.

A. No, sir.

Q. In reading this letter do you remember any conversation you had with Mr. Smith about the matters contained in this letter, about Bess or the children?

A. No.

Q. Now, if I understood you correctly, when I talked with you, I understood you to tell me that Mr.

Smith came down and discussed these matters at one time with you and your husband?

A. No, he never came to Canton.

Q. He never came to Canton.

A. No.

Q. Then if I understood you correctly, you discussed some matters with him one time here at Minneapolis. Do you remember that?

A. Yes.

Q. And it was not at Canton?

A. No, not at Canton.

Q. And it was not at Canton?

A. No.

Q. Do you remember what that conversation was, in substance what Mr. Smith said?

A. No.

Q. Was that before or after he married the last time, that you had the conversation here at Minneapolis?

A. It was after he married Mrs. Wallace.

Q. The woman who is now Mrs. Wallace?

A. Yes, sir.

Mr. Jackson: Her name was Mrs. Grahame before she married Mr. Smith, wasn't it?

Witness: I think so.

Q. Was Mrs. MacLean present at any conversation that you had about that matter?

A. No.

Q. Was that conversation with respect to the care of the boys?

A. I think Donald and Robert, then.

Q. Bess also?

A. No, he didn't ask us to take Bess. He expected to have Bess right in his home for his housekeeper.

Q. At the time when you talked about taking the boys?

A. Yes, then she made up her mind to go on the stage.

Q. He told you he expected her as his housekeeper?

A. Yes.

Q. When was this?

A. It was after my sister's death.

Q. After your sister's death?

A. Yes.

Q. Do you know where your niece is now, do you know where she is living now?

A. Yes, she is in Washington.

Q. Have you heard from her recently so that you know she has been there recently?

A. Yes, sir. I received a letter from her just a short time ago.

Q. Since you talked with me?

A. No, it was before that.

Q. You understand the boys are with her, too?

A. Yes, the boys are with her.

Q. Did Mr. Smith say anything to you at any time you talked with him, about him and Bess's own father contributing to her support?

Mr. Jackson: Objected to as immaterial and irrelevant.

A. No.

CROSS EXAMINATION.

By Mr. Jackson.

Q. Did you come to Minneapolis to live, Mrs. Wright, before Mr. Smith's death? I think he died in August, 1908, wasn't it; I don't remember. At all events, do you know whether he was still living when you came to Minneapolis to live?

A. That was about thirty years ago, and then we left here.

Q. Yes, but I am speaking about the time that you came back; the last time you came to live here; was Mr. Smith alive at that time?

A. No, that was after his death.

It is stipulated and agreed by and between the parties hereto, by their respective counsel, that the reading and signing of said deposition by the said witness is hereby expressly waived.

G. H. HEMPERLEY,

Being first duly sworn, testified as follows:

Examined by Mr. Mercer:

Q. Mr. Hemperley, you are a deputy clerk in the District Court of Hennepin County of the Fourth Judicial District in Minnesota?

A. I am.

Q. How long have you been deputy clerk there?

A. I have been employed in the office there for twenty years, but deputy for seventeen years. I was too young when I went in to be sworn in.

Q. Directing your attention to the records of that Court, No. 86488, the case of Elizabeth M. MacLean,

plaintiff, vs. Donald MacLean, Jr., defendant, a divorce case in which the judgment roll was entered on the 9th day of January, 1902, and in which Alexander M. Harrison acted as Judge, I will ask you if you have searched the clerk's office and the clerk's records of that Court to ascertain whether or not the book upon which the Judge made his memoranda during the course of the trials—that is, the book which he used himself as a sort of personal docket—is in the records of the clerk's office?

Mr. Jackson: I will object to the question in that form, assuming the existence of a book that I don't know anything about. Maybe there was and maybe there wasn't such a book. All the witness could testify to, I think, would be as to whether there was or was not a book of the description given, in the custody of the clerk.

Q. Mr. Hemperley, you may tell us whether or not it has been the practice for the Judge to have a book which is called the Judge's docket, which he keeps during trials and makes such memorandums as he wants to make personally in that court?

Mr. Jackson: Objected to as immaterial, irrelevant and incompetent, and calling for the conclusion of the witness.

A. I know they keep a minute book of their own.

Q. And did during the time I refer to here?

A. Yes, sir.

Q. Each Judge kept one?

A. We furnish the record ourselves; the blank book for them.

Q. The clerk furnishes the blank book?

A. Yes, sir.

Q. Now, have you searched for the book which Judge Harrison had during the time this case was tried?

A. I did.

Q. Did you find it?

A. I did not.

Q. Did you also investigate to see whether or not there was any transcript of evidence in that case?

A. I did.

Q. Was there any?

A. None filed.

Q. Now, with respect to the case of Elizabeth M. Price vs. Marie Dewey Smith in which an order was entered on the 22nd day of January, 1909, by Frederick V. Brown, Judge, did you search the clerk's office in that case to see if you could find the Judge's minute book?

A. I did.

Q. Were you able to find it?

A. I was not.

Q. Was the search thorough in each of these instances

A. Yes, sir.

Q. Was there any transcript of a record in that case—I mean of testimony?

A. None filed.

(Cross examination waived)

It is stipulated and agreed by and between the parties hereto, by their respective counsel, that the reading

and signing of said deposition by the said witness is hereby expressly waived.

MRS. STELLA B. LAUDERDALE,

Being first duly sworn, testified as follows:

Examined by Mr. Mercer:

Q. Mrs. Lauderdale, what is your given name?

A. Stella B.

Q. And your husband's name?

A. John W.

Q. You live in Minneapolis on Third Avenue south?

A. Yes, sir.

Q. What number?

A. 1613.

Q. That is not far from the place where Peter B. Smith lived at the time his wife died who was the mother of Bess?

A. No.

Q. And not very far from where he lived after his last marriage, was it?

A. No, right near.

Q. You knew Peter B. Smith?

A. Yes, sir.

Q. And you knew his last wife?

A. Yes, sir.

Q. And his next to the last wife?

A. Yes, sir.

Q. And Bess?

A. Yes, sir.

Q. He was married three times, wasn't he?

A. Yes, sir.

Q. Were your families friends?

A. Friends?

Q. Yes.

A. Yes, very good friends.

Q. Both as to Mr. Smith and as to both of the last wives, and also as to Bess?

A. Yes, sir.

Q. And I had to subpoena you to get you down here?

A. Yes, sir.

Q. Do you remember a time when Bess was on the stage—Mrs. Price, it is now?

A. Yes, sir.

Q. Do you remember going with your husband one Sunday evening over to lunch at the Smith residence, after he married the woman who is now Mrs. Wallace?

A. Yes, sir.

Q. And do you remember a conversation taking place there about Bess, with Mr. Smith?

A. Yes, sir.

Q. You may tell us what you can that Mr. Smith said that evening?

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant, and too indefinite as to time to enable the plaintiff to meet it in any way.

Q. Before there is any answer, I will ask you, Mrs. Lauderdale, if you can tell us any more definitely about when it was with respect, for instance, to the time when Bess was on the stage?

A. Well, it is hard to remember to tell—it was the

first year of Mr. Smith's marriage to the present Mrs. Smith.

Q. The first year?

A. Yes, it was in that first year, I think, in the summer; he was married in May and it was along toward the last of the summer or fall, I should say.

Q. Of the same year?

A. Yes, as I can remember. It is quite a little while ago.

Q. So that if he was married to Mrs. Grahame in May, 1902, it would be your best recollection that the conversation took place in that same fall?

A. That fall, I would say, as near as I can remember.

Q. Some time during the summer or fall?

A. Yes, it was late.

Q. Was Bess present?

A. No.

Q. Who was present?

A. Just we four; Mr. and Mrs. Smith, Mr. Lauderdale and myself.

Q. Now, Mrs. Lauderdale, you may tell us if you can, what that conversation was.

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant.

A. (No answer.)

Q. Mr. Smith was present during all that time, was he not,—and who brought up the conversation?

A. Mr. Smith.

Q. Now, I will ask you to give us that conversation, as best you remember it.

Mr. Jackson: The same objection.

A. It was in reference to him feeling so badly about what Bess had done.

Q. Now tell us, as far as you can, what Mr. Smith said and what was said by others.

A. Well, it was in reference to—so much had been said about outsiders, and he said he didn't care for the general opinion of people, but there were some of his intimate friends that he would like to explain the situation to and let them understand; aside from that he didn't care, and he went on to tell how extravagant she had been with money he had given her after her mother died, to take care of the house, how she had misused it and the way it had been spent and the many bills that had been contracted even aside from that, and the things that had been done—lots of things that I can hardly remember; but it was all pertaining to the way things had gone.

Q. How did Mr. Smith appear during that conversation?

Mr. Jackson: The same objection.

A. Well, he felt bad.

Q. He appeared to feel badly?

A. Yes, very crushed and hurt, and he cried.

CROSS-EXAMINATION.

Examined by Mr. Jackson:

Q. If I understand you, Mrs. Lauderdale, Mr. Smith had been married to his last wife, the present Mrs. Wallace, some three or four months at the time of this conversation?

A. As near as I can remember.

Q. And the matter which you mention and the only specific matter which you mention, was something which had occurred two years or more before that time?

A. Not so far back, but I think right straight along.

Q. I understood you to say that after Bessie's mother died, the thing that he complained of particularly was that she didn't make good use of the money he gave her for housekeeping, after her mother's death. Is that right?

A. Not especially that time, Mr. Jackson, from that time right on many things—not especially the money but everything in connection with it. Up to the time he told us, right straight through that time.

Q. Now, Bessie was not at home at that time?

A. No.

Q. She had gone upon the stage?

A. Yes.

Q. At whose suggestion or request did you go over to the Smith home that evening?

A. I think Mrs. Smith called us up, or Mr. Smith.

Q. Of course you only know that she called you up by phone and invited you to come over, said they would like to have you come over that night?

A. For lunch.

Q. And the conversation was general, all four of you taking part in it?

A. Yes, sir.

Q. And this subject about Bessie, was that introduced in connection with an explanation of her going on the stage?

A. I can't remember in regard to that, but I think

Mr. Smith brought it up himself. He felt so badly that he wanted to tell us.

Q. About her going on the stage?

A. Not especially, maybe that was included.

Q. That was just at the time—the end of the summer or first of September that you refer to?

A. I cannot be sure about that.

Q. They wanted to explain, to exonerate themselves from any criticism because she had gone on the stage?

Mr. Mercer: Objected to as assuming something the witness has not said.

A. Not “they”; Mrs. Smith wasn’t in that at all. She listened the same as we did. It seemed to be freely on Mr. Smith’s part.

Q. Now, did you know Mr. Smith at the time that he married Bessie’s mother?

A. No, sir.

Q. When did your acquaintance with him begin?

A. Well, I think they had been married several years before we met them. I can’t tell just the year.

Q. When you first became visiting acquaintances with Mr. Smith and his wife, the wife that he had then was Bessie’s mother?

A. Yes, sir.

Q. And was Bessie living at home at that time?

A. Yes, sir.

Q. How old would you think she was at that time?

A. Well, about seventeen or eighteen; she might have been even younger.

Q. That was before her marriage to Doctor MacLean?

A. Yes, sir.

Q. Do you know about how long before—how long did you know the family in a visiting way, before Bessie's marriage to Doctor MacLean?

A. It may have been three or four years.

Q. Now, by what name were you introduced to Bessie?

A. Smith; always.

Q. So far as you know, she was always known as Bessie Smith?

A. I never knew her other name.

Q. Well, from the time of your first acquaintance with this family down to the time of the death of Bessie's mother, were you quite intimate with them?

A. Yes, sir.

Q. Visited back and forth a good deal?

A. Yes.

Q. Did you have any means of observing Mr. Smith's attitude toward Bessie as to whether—well, what his attitude or manner was toward Bessie with respect to her at that time?

Mr. Mercer: Objected to as not proper cross examination.

A. Very friendly, just like a father would be.

Q. His conduct and manner toward her was just like that which you would naturally expect of an own father, was it?

A. Yes.

Q. But as to her manner and conduct toward him?

A. It was just as nice as his was toward her.

Q. Such as an own daughter would naturally have toward her father?

A. Yes, sir.

Q. Now, during the time between the death of Bessie's mother, which occurred I think in June, 1900, and this conversation that you speak of in the late summer or early fall of 1902, covering a period of two years and some months, were you frequently at Mr. Smith's house?

A. Yes, sir.

Q. And during that time until his marriage to Mrs. Grahame in May, 1902, who was apparently the house-keeper or mistress of the house?

Mr. Mercer: Objected to as not being proper cross examination and no foundation laid.

A. Bess.

Q. During the winter of 1901 and 1902, that is, the winter immediately preceding Mr. Smith's marriage to Mrs. Grahame, how often do you think you were at Mr. Smith's house, Mrs. Lauderdale?

A. Very often. I think he was at ours more than we were at theirs.

Q. When he came to your house did Bessie sometimes come with him?

A. Very often.

Q. Did they ever bring the children, Bessie's children?

A. Yes, sir.

Q. Well, can you give us an idea of about how often during that winter, you met Mr. Smith and Bes-

sie either at their house or at yours,—in a general way,—can you say about how often?

A. Mr. Smith was at our house a great deal because he and Mr. Lauderdale played cards together. He would come up,—he was at our house a great deal, perhaps three or four times a week, and in the meantime we would go down and see Bess and the children.

Q. Mrs. Lauderdale, during the whole time from the death of Bessie's mother, during the nearly two years following that when Bessie was keeping house for Mr. Smith and you were exchanging visits in the way you have told us of, down to the time of Mr. Smith's marriage to Mrs. Grahame, did Mr. Smith ever make any complaint to you about Bessie at all?

A. No.

Q. And it wasn't until three or four months after his marriage to Mrs. Grahame that Mr. Smith became so affected by the recital of the wrongs which he had suffered at Bessie's hands, that he was moved to tears on the occasion you speak of. Is that right?

Mr. Mercer: Objected to as argumentative and not proper cross examination, and assuming something that the witness is not shown to know as whether he was ever in tears before, or whether Mrs. Smith had anything to do with it.

A. I don't think it all came at that one time; I think Mr. Smith had lots to contend with before that time in regard to Bess's actions, but that was the time he opened his heart and complained, because we all knew that everything wasn't just right there; everything wasn't harmony up to that time.

Mr. Jackson: I move to strike out the answer of the witness except in so far as it is responsive to the question.

Mr. Mercer: I object to striking any part of it out.

Q. I asked you a few minutes ago if Mr. Smith had ever made any complaint to you or in your presence about Bessie, until this time you speak of, the late summer of 1902, and I understood you to say "No." Was I mistaken?

A. In this regard; not to come out and feel as he did. We being so intimate there—

Q. Mrs. Lauderdale, you are volunteering a good deal here that is not called for. I asked you the question as to whether Mr. Smith ever made any complaint to you or in your presence in regard to Bessie, until this time, and understood you to say "No." Is that right?

A. Not a strong one like that; he never did.

Q. Did he ever make a weak one or any one?

A. (No answer.)

Q. Did he ever, on any occasion, make any complaint to you? If so, I will ask you to specify the occasion and tell us what he said. I don't want you to argue about the matter, what you think may have been the case, I am simply asking what actually did take place. Is it true or is it not true, as you testified a few minutes ago, that Mr. Smith never did make any complaint to you about Bessie until this time you told us about? Is that true, or do you want to qualify it?

A. I want to in this way; that there had been slight objections, but it wasn't as strong as at that one time.

Q. Now, then, what one time do you refer to? Tell when it was and just what was said.

A. I cannot tell you exactly when, but when—

Q. About when, as near as you can tell?

A. It was along before this one Sunday night—

Q. Before or after his marriage to Mrs. Grahame?

A. It was after Bess went on the stage. That was the trouble; it all came along in that same time.

Q. You never did hear any complaint from Mr. Smith until Bessie went on the stage; is that right?

A. I can't be sure.

Q. Have you any recollection of any complaint ever being made by Mr. Smith about Bessie until after she went on the stage?

A. I can't be sure.

Q. Have you any recollection of any at all? Do you now recall any complaint?

A. You mean any little one?

Q. Any kind of complaint made by Mr. Smith to you about Bessie before the time she went on the stage?

A. In this way; Bess being young and perhaps she wasn't using her best judgment,—as you would be with friends, they would naturally say little things to you in that way.

Q. But never in the way of a serious complaint or criticism?

A. No, not until that Sunday night.

REDIRECT EXAMINATION.

By Mr. Mercer :

Q. In the course of that Sunday night, was there anything said as to whether or not he had found that

money he had given Bess to run the house on, even down to the time he went away on his last wedding trip, had been used for other purposes? If there was any such thing said, tell us what it was.

Mr. Jackson: Objected to as leading, incompetent, immaterial and irrelevant, and not proper re-direct examination.

A. Yes, he did; he said the money had been used in many ways that he had given for the house.

Q. Did you know about the time Bess went to Europe with her father and Mr. Ailes?

A. Yes, sir.

Q. And you knew about her marriage at that time to Donald MacLean?

A. Yes, sir.

Q. Do you know when her own father came back to Minneapolis with her, after that marriage?

A. I do not.

Q. Mr. Smith, as I understood you, treated Bess kindly always, as far as you could see?

A. Yes, sir.

Q. And as well as you would expect any step-father to treat a step-daughter?

A. Yes, sir.

Q. Did Mrs. Smith have anything to say in this conversation against Bess the night that Mr. Smith was talking to you?

A. Not as I can remember.

Q. As I understood you, you rather thought she telephoned you to come over that night to supper?

A. I cannot be sure. She usually did for Mr. Smith, but I wouldn't be sure.

Q. At any rate, it was customary in Minneapolis, when people were invited to supper, to have the invitation to come from the hostess?

A. Yes, sir.

Q. Did Mr. Smith ever say anything to you with respect to whether he was displeased as to Bess going on the stage?

Mr. Jackson: Objected to as not redirect examination, incompetent, immaterial and irrelevant, and indefinite as to time and place.

A. Yes, sir.

Q. Mrs. Lauderdale, what did Mr. Smith say about her going on the stage?

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant, and indefinite as to time and place.

A. He objected strongly; was very much opposed to it.

Mr. Jackson: I move to strike out the answer as not responsive to the question and a conclusion of the witness.

Q. When was it that you heard him object to it?

A. She had been on the stage. She was on the stage then. She was on before he realized it, I guess.

Q. But he did tell you that he objected to it?

A. Yes, sir.

Q. Now, during the time she was there as house-keeper that you mention, he had a maid called Emily, did he not?

A. Yes, sir.

Q. And you saw her here this morning at this office?

A. Yes, sir.

Q. And she stayed there as long as Bess stayed there?

A. I wouldn't be sure as to that.

Q. You know she was there for some time?

A. Yes, sir.

Q. In addition to that, they had a nurse for the boys?

A. Yes, sir.

Q. Did you ever see Bess doing any house work?

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant, and not redirect examination.

A. Not very much.

Q. Did you ever see her doing anything toward the house work, in the management, such as an employed housekeeper would ordinarily do?

Mr. Jackson: The same objection.

A. Yes, I have heard her order the things for the day.

Q. But in the main did she, so far as you could see, do very much work herself about the house?

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant and not proper redirect examination.

A. No.

RECROSS EXAMINATION.

By Mr. Jackson:

Q. I understood you to say just now that you thought Bessie went on the stage before Mr. Smith

really knew it. Why do you say that?

A. Because, as I remember, she was on the stage before he knew it. I heard him say so.

Q. Did you hear him say that?

A. Yes, sir.

Q. When?

A. It must have been one time at our house.

Q. At your house?

A. Yes, sir.

Q. On this Sunday evening at their house?

A. No.

Q. Before or after that Sunday evening?

A. I can't remember exactly.

Q. He didn't tell you then that before Bessie went on the stage he agreed with her that he would send her a check each week for the same amount that she might engage with the manager for?

A. No, sir.

Q. He didn't tell you that?

A. No, sir.

Q. He didn't tell you that he had fully approved and consented to Bessie trying her luck on the stage?

A. No, sir.

Q. But you testified that he did actually tell you at your house that he didn't know Bessie was going on the stage until after she had begun her engagement? Do you mean to do that?

A. Not positively that he didn't know, but he didn't like it.

REDIRECT EXAMINATION.

By Mr. Mercer:

Q. During the time that Bess was on the stage, the two children and the nurse were there with Mr. and Mrs. Smith?

A. Yes, sir.

Q. And stayed there in the house with them?

A. Yes, sir.

Q. Mrs. Smith had the oversight of those children at that time?

A. Yes, sir; and she was very good to them.

Mr. Jackson: I move to have that answer stricken out as not responsive.

Q. How did Mrs. Smith, so far as you could tell, appear to treat the children?

A. Very well.

Q. On all occasions?

A. Yes, indeed.

RECROSS EXAMINATION

By Mr. Jackson:

Q. About this matter of housekeeping, you were your own housekeeper at your house for yourself and husband?

A. Yes, sir.

Q. Now, when people came to visit you, you didn't make any great display of what you were doing in your capacity as a housekeeper, I suppose, while you were entertaining visitors, did you?

A. I tried to have it as nice as I could.

Q. People who came to call on you wouldn't be likely to see what you were doing as a housekeeper?

A. Not for a lunch. I wouldn't be working then.

REDIRECT EXAMINATION.

By Mr. Mercer:

Q. I suppose it was customary to have a little difference between a person who was the wife of the man of the house and an employed housekeeper, wasn't it?

A. Yes, sir.

It is stipulated and agreed by and between the parties hereto, by their respective counsel, that the reading and signing of said deposition by the said witness is hereby expressly waived.

EMILY CARLSON,

Being first duly sworn, testified as follows:

Examined by Mr. Mercer:

Q. Your name is Emily Carlson?

A. Yes, sir.

Q. You live in Minneapolis?

A. Yes, sir.

Q. Were you employed in the home of Peter B. Smith in Minneapolis at one time?

A. Yes, sir.

Q. For how long a period of time?

A. I came there in 1897 and left in 1907.

Q. Came in 1897 and left in 1907?

A. Yes, sir.

Q. So that you were there while Bess was there?

A. Yes, sir.

Q. At least part of the time while she was there?

A. Yes, sir.

Q. You stayed there constantly during those years, I suppose?

A. I might have been away two weeks at a time once in a while. I went to Sweden in 1895 and came back in 1896 in the spring.

Q. That is, 1905 you went to Sweden?

A. Yes, before Christmas and came back in the spring.

Q. But outside of that and just a few days at a time, you were constantly there at the house for those ten years?

A. Yes, sir.

Q. In what capacity?

A. I was doing general house work to begin with.

Q. General house work to begin with?

A. Yes, sir.

Q. That was in the lifetime of Mr. Smith's wife who was the mother of Bess, as they call her?

A. Yes, sir.

Q. Now, after that did you work—did your position change after that?

A. I did the same thing.

Q. All the time?

A. Yes, sir.

Q. Did you do all the housework for the house?

A. Yes, sir.

Q. And did you have anything to do with ordering the groceries or things of that sort?

A. Yes, most of the time.

Q. After Bess's mother died, what did you have to do with respect to the house work; did you do it all?

A. The same thing.

Q. You did all the house work, up stairs and down?

A. Yes, sir.

Q. And the cooking?

A. Yes, sir.

Q. And after that Mrs. Smith died, the family consisted of Mr. Smith and Mrs. MacLean part of the time, and Mr. MacLean part of the time?

A. Yes, sir.

Q. And Donald MacLean, and later the two boys?

A. Yes, sir.

Q. Now, was there any other person employed to assist in the work, as a nurse or anything of that sort?

A. Yes, sir.

Q. Had charge of the two boys?

A. Yes, sir.

Q. Was there a nurse there constantly while the boys were there?

A. Yes, sir.

Q. You didn't have to look after the boys?

A. No, sir.

Q. Did the nurse do that completely, so far as you can tell?

A. Yes, sir.

Q. Now during this period, who generally ordered the groceries and did the things of that sort?

Mr. Jackson: Objected to as immaterial and irrelevant.

A. After the mother died?

Q. After the mother died.

A. I did it most of the time.

Q. About what time of day would you have breakfast?

Mr. Jackson: Objected to as immaterial and incompetent.

A. About eight o'clock.

Q. And what time of day would Bess rise, as a general thing?

Mr. Jackson: Objected to as immaterial and irrelevant.

A. Sometimes—

Q. In time for breakfast with Mr. Smith?

Sometimes and sometimes not.

Q. How about the usual or general thing; did she usually get up?

A. She got up more than she stayed in bed.

Q. How about the boys; would they be up?

A. They would be down.

Q. They would be down before Mr. Smith had his breakfast, I suppose?

A. Donald was always down.

Q. Now, you stayed on there until Mr. Smith married the woman who is now Mrs. Wallace?

A. Yes, sir.

Q. And Bess stayed there some little time after that?

A. Some little time, yes.

Q. Did Bess have anything to do with the house-

keeping after Mrs. Smith came there, the new Mrs. Smith?

A. No, she did not.

Q. The nurse still stayed for the boys?

A. Yes, sir.

Q. What did she do after that?

A. Bess?

Q. Yes.

A. Well, I could hardly tell you. Sometimes she took care of the boys a little while and she went about, back and forth, I don't know what she did when she went out. Sometimes friends would come and see her.

Q. Was that about the same as it was before Mr. Smith married?

A. Yes, sir.

Q. Did you see much change in what she did toward the house work, the management and so forth, after the marriage,—after Mr. Smith married—

A. I didn't notice; I went on and did my work the same as usual.

Q. What I am getting at is, was there anything in particular that Bess did do while she was living there after her mother died and before the new Mrs. Smith came in, toward running the house, that she didn't do afterwards, that you know of?

A. After Mrs. Smith came in I don't know that she ran the house at all.

Q. What did she have to do with running the house before; that is what I am trying to get at.

A. She was supposed to be the housekeeper, sup-

posed to be the head of the house. That is what Mr. Smith told me.

Q. Mr. Smith told you she was to be housekeeper?

A. Yes, the same as Mrs. Smith had been.

Q. And so far as the work was concerned for the house, you did that, and the nurse did it for the boys?

A. Yes, sir.

Q. You may tell us whether or not you knew of any difficulty between Mr. Smith and Bess after he came back from his wedding trip.

A. I never witnessed anything.

Q. Did you hear any talk?

A. I didn't hear anything.

Q. Did you know anything about Bess allowing a lot of bills to accumulate for the housekeeping about that time?

Mr. Jackson: Objected to as immaterial and irrelevant.

A. I heard something from other people but never heard her say it. I didn't know anything about it.

CROSS EXAMINATION

By Mr. Jackson:

Q. During the two years, practically, between the death of Bessie's mother and Mr. Smith's marriage to the present Mrs. Wallace, did Mr. Smith have a good deal of company there evenings at the house, did friends come in?

A. Same as usual, as far as I can remember, quite a few men came there.

Q. The same as usual? Of course we don't know

anything about what "usual" was. Is it a fact he used to have a good many friends come to the house evenings?

A. Yes, sir.

Q. He used to have gentlemen friends come to the house to play cards, did he, a good deal?

A. Yes, sir.

Q. And on those occasions do you know whether Bessie would be in the room with them and taking part in their amusements, etc.?

A. Yes, she stayed right with them.

Q. And they had entertainment, I suppose, things to eat and drink, etc.?

A. Yes, always.

Q. Did Bessie look after that matter of the arrangement of the things for them to eat and drink, do you know?

A. I got the lunch ready. They ordered it and I got it ready.

Q. Who ordered it?

A. Mr. Smith and Bessie Smith.

Q. By the way, I was going to ask you, during the time that you were there and before Bessie's marriage to Doctor MacLean, how was she commonly called by people who came to the house?

A. Bessie Smith.

Q. Called Bessie Smith?

A. Yes, Bessie Smith.

Q. Mr. Mercer has asked you whether she did any of the actual work about the house, or something to that effect. Did I understand you to say that her position in the household was practically the same as her mother's

position before her death as the head of the house? Is that right?

A. That is what Mr. Smith told me, that Bess was going to go on the same as usual.

Q. Did Bessie receive the visitors who came to the house, as the lady of the house, and so forth?

A. Yes, sir.

Q. And her position that which is ordinarily occupied by the daughter of a father whose house it is?

Mr. Mercer: Objected to as not proper cross examination and no foundation laid.

A. As far as I could understand.

Q. What have you to say, Emily, as to Mr. Smith's attitude and conduct toward Bessie and her children, as to whether he seemed to be fond of them or otherwise?

Mr. Mercer: Objected to as incompetent and not proper cross examination.

A. Yes, he loved her children.

Q. What was his conduct and attitude toward her?

Mr. Mercer: The same objection.

A. I didn't see anything out of the way. They may have had a few words, but not any more than any other family, that I could see.

Q. What I want to get at is whether the conduct and relations between Mr. Smith and Bessie were or were not similar to those between father and daughter ordinarily?

A. That is what I understood.

Q. Did she appear to be fond of him and attentive to him?

A. Yes, sir.

Q. And how did he appear to be toward her?

Mr. Mercer: The same objection.

A. Just the same as a father would be.

Q. You have seen families, have you not, where the mother had died and the father and daughter would carry on the home, you have seen such families and known such families?

A. I have never worked anywhere before.

Q. Have you known of such cases?

A. Yes, sir.

Q. What I want to get at is whether the relation between Mr. Smith and Bessie appeared, so far as you could see, to be as it would be between father and daughter ordinarily who are fond of each other and did their duty by each other?

Mr. Mercer: Objected to as calling for the conclusion of witness, no foundation laid for it, grouping a lot of questions together and not proper cross examination.

A. As far as I could understand. I was with them very little because I had plenty of work to do and kept my place in the kitchen where I belonged.

Q. You spoke of a nurse girl. What was her name?

A. The last one?

Q. I didn't know there was more than one.

A. Yes, there was quite a few. The last one, her name is Mrs. Hanna Newstrom.

Q. Was there another one before that?

A. Let me think. I cannot think who was before that. I believe her name was Amanda Horn.

Q. Do you think she was the nurse before Hanna Newstrom?

A. Yes, sir.

REDIRECT EXAMINATION.

By Mr. Mercer:

Q. In the course of your work there, during the time that Bess was housekeeper, you practically went ahead and did as you pleased about running the house?

A. I did, yes.

Q. Now, did you know anything about the plan of Bess to go to Donald MacLean some months after he went away?

Mr. Jackson: Objected to as immaterial, irrelevant and incompetent and not redirect.

A. She didn't tell me.

Q. She didn't tell you anything about that?

A. No, she didn't.

Q. You did the serving at the table during the time you were there?

A. Yes, until after the children had gone, then they had a regular second girl.

Q. After the children had gone?

A. Yes, then the nurse took the second place.

Q. Before that you did the serving as well as the other housework?

A. Yes, sir.

Q. Did you hear any discussion about property or anything of that sort between Mr. Smith and Bess?

Mr. Jackson: Objected to as immaterial and incompetent.

A. No, sir.

Q. Were you there at the time Mr. Smith died?

A. Yes, sir.

Q. And did you remain there for some time after that?

A. Until the very last of October.

Q. The very last of October of that fall, and he died in the summer?

A. Yes, or the first of November; I cannot remember which.

Q. Do you remember a visit of Mr. and Mrs. Price at the house a short time after Mr. Smith's funeral?

A. Yes, sir.

Q. They didn't arrive there before the funeral?

A. No, they came after.

Q. Mr. Smith died down east, I believe?

A. Yes, sir.

Q. How long did they stay, so far as you recollect, at the time they came?

A. I don't think they stayed more than a couple of weeks.

Q. They stayed at the house with Mrs. Smith?

A. Not all the time. Some of the time they stayed with Mrs. Carey Smith.

Q. By the way, during the time that Bess was acting as housekeeper, Mr. Smith had a nephew here by the name of Arthur Smith who frequently came back and forth to the house?

A. Yes, sir.

Q. And he was the husband of Jessie Carey Smith?

A. Yes, sir.

Q. And Jessie Carey Smith was frequently at the house?

A. Yes, sir.

Q. And Jessie Carey Smith and Arthur Smith were there often to Sunday dinner?

A. Yes.

Q. And other meals?

A. Yes, sir.

Q. Spent a great deal of time there?

A. Yes, if it wasn't every day it was every other day.

Q. That they were there?

A. Yes, sir.

Q. And very close friends apparently, so far as you could see?

A. Appeared to be.

Q. And this continued between the time Mrs. Smith died, who was Bess's mother, and the time Mr. Smith married the lady who is now Mrs. Wallace?

A. Yes, sir.

Q. How did Mrs. Smith, so far as you could see, treat Bess after she came there?

A. She didn't like her, I know that.

Q. She didn't like her?

A. No.

Q. Did Bess like Mrs. Smith?

A. She didn't feel at home after she came there.

Q. You never heard any controversy between them, did you

A. Any scraps between them, you mean?

Q. Yes.

A. I didn't witness anything; not anything that they had face to face.

Q. Not anything that they had face to face?

A. Yes.

Q. Did you know about Mrs. Smith saving money out of her own allowance to pay grocery bills, to keep Mr. Smith from knowing that Bess misappropriated the money?

Mr. Jackson: Objected to as incompetent and irrelevant.

A. I didn't know anything about what she did with the money.

RECROSS EXAMINATION.

By Mr. Jackson:

Q. What do you say as to Mrs. Smith's attitude and conduct toward the boys, the children; did she seem to be fond of them?

A. I don't know.

Q. What do you think about it?

A. I don't think she cared a great deal for them; she was good to them, but I don't think she cared for them.

Q. From what you observed, did it appear that she was fond of the boys or that they annoyed her and bothered her?

Mr. Mercer: Objected to as not proper cross examination and no foundation laid.

A. If she was fond of them—

Q. From what you saw, did she appear to be fond

of them and like to have them there, or did they seem to annoy her and bother her?

A. They seemed to annoy her once in a while. Of course the nurse took care of them.

REDIRECT EXAMINATION.

By Mr. Mercer:

Q. From what you saw, Mrs. Smith was good to the boys, wasn't she?

A. I didn't see her being mean to them. Of course she had nothing to do with them; the nurse took care of them altogether.

Q. And you didn't see but what she treated them as well as any woman would treat children that were in the house that she was not in any way responsible for?

A. Really, the nurse took care of them.

Q. Mrs. Smith saw that they had plenty to eat and had good care?

A. Yes, but she didn't have to bother with them.

Q. You didn't see anything wrong that she did about them?

A. I didn't see anything wrong.

It is stipulated and agreed by and between the parties hereto, by their respective counsel, that the reading and signing of said deposition by the said witness, is hereby expressly waived.

Adjourned until April 24th, 1915, 10 o'clock a. m.

April 24th, 1915, 10 o'clock a. m., adjourned to April 29th, 1915, at 8 o'clock p. m.

April 29th, 8 o'clock p. m., adjourned to May 1st, 1915, at 10 o'clock a. m.

May 1st, 1915, 10 o'clock a. m., adjourned to May 4th, 1915, at 10 o'clock a. m.

May 4th, 1915, 10 o'clock a. m., adjourned to May 5th, 1915, at 9:15 a. m., at which time the taking of depositions was resumed, there being present A. B. Jackson and A. M. Higgins on behalf of the plaintiff, and H. V. Mercer on behalf of the defendant.

WM. A. LANCASTER,

Being first duly sworn, testified as follows:

Examined by Mr. Mercer:

Q. Your name is Wm. A. Lancaster?

A. Yes, sir.

Q. You are an attorney at law?

A. Yes, sir.

Q. And engaged in general practice in Minneapolis?

A. Yes, sir.

Q. How long have you been in practice in Minneapolis?

A. Twenty-eight years.

Q. Does that include the time you were on the bench?

A. Yes, sir.

Q. You were Judge of the District Court of the Fourth Judicial District in Minneapolis?

A. For a time.

Q. In 1907 and 1908 what was the style of the firm with which you were connected?

A. Lancaster & McGee.

Q. That was John F. McGee, a former Judge of the same court?

A. Yes, sir.

Q. At the present time the style of your firm is what?

A. Lancaster, Simpson & Purdy.

Q. That is Judge David F. Simpson, formerly of the Supreme Court?

A. Yes, sir.

Q. And Milton D. Purdy, formerly Federal Judge and before that connected with the Attorney General's office?

A. Yes, sir.

Q. Did you have to do with the case of Elizabeth M. Price against Marie Dewey Smith in the State District Court at Minneapolis as counsel for the defendant while you were engaged in practice here in 1907 or 1908?

A. In 1908, as I remember it. In August, 1908, I was employed as associate counsel with—

Q. With me?

A. With Wilson & Mercer.

Q. There was a demurrer, I believe, interposed in that case and argued before Judge Frederick V. Brown?

A. Yes, sir.

Q. In the State District Court at Minneapolis?

A. Yes, sir.

Q. You were present at that argument?

A. Yes, sir.

Q. Took part in it?

A. Yes, sir.

Q. Who argued the case for the defendant in support of the demurrer?

A. I did.

Q. And who represented the plaintiff in court at that argument?

A. A. M. Higgins of Minneapolis..

Q. The same Mr. Higgins who is here now?

A. Yes, sir.

Q. How long did the argument on that demurrer last?

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant.

A. A day and a half, or practically a day and a half. I don't mean precisely a day and a half, but about that time.

Q. At any rate, it was more than one day?

A. It was approximately a day and a half that we were engaged in the argument of the demurrer.

Q. Upon that hearing was there anything done with respect to admissions for the purposes of argument as to whether the agreements alleged in the complaint were oral?

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant, and not the best evidence.

A. Yes, sir.

Q. You may tell us what it was.

Mr. Jackson: The same objection.

A. Upon commencing the argument on behalf of the defendant upon the ground stated in the demurrer, that the complaint failed to state facts constituting a cause of action, counsel for the plaintiff was asked by

myself if it might be stipulated for the purposes of the demurrer, that all three agreements alleged in the complaint were oral agreements, and counsel for the plaintiff, in open court, stipulated that the purposes of that demurrer, all of the agreements set out in that complaint were oral agreements and that none of them were in writing.

Q. Did the argument proceed on the demurrer and upon the assumption of that stipulation after it was made?

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant.

A. Yes, sir.

Q. You may state what was done with respect to the argument on the demurrer and the stipulation after the stipulation was made?

Mr. Jackson: The same objection.

A. The argument on behalf of the defendant was based upon the proposition that all three of those agreements were oral agreements, and not in writing, any of them.

Q. You may tell us, if you recollect, what the lines of argument were that were made for the defense in that case?

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant.

A. I remember this distinctly; that in taking up the argument on the demurrer after the stipulation had been made, I stated to the Court that in view of the stipulations, our contention was that the merits of the controversy were necessarily involved and that I should

take considerable time in view of that to argue what I considered the merits of the controversy; that is, that the complaint did not state facts sufficient to constitute a cause of action, and I devoted all of my time to the discussion of those propositions; the original agreement, the modified agreement and as I remember it, a sort of declaration, an alleged declaration of trust on the part of the defendant, Marie Dewey Smith; that is, the then defendant.

Q. I was present in court at the same time?

A. Yes, Mr. Mercer was present. I don't recall whether General Wilson was there or not.

Q. After you closed your argument, was there any further argument made for the defense?

A. No.

Q. Now, what was done with respect to arguing the cause for the plaintiff?

Mr. Jackson: The same objection; incompetent, immaterial and irrelevant.

A. My recollection is that immediately after my argument on the ground of the demurrer that the complaint did not state sufficient facts for cause of action, Judge Brown referred to the other grounds stated in the demurrer—there were some other grounds which I don't have in mind just now—he said he would like to hear from the other side, and my recollection is that Mr. Higgins made rather a brief argument and said that he would stand on his complaint as drawn, but before the decision was rendered he made the statement to the Court that if the demurrer should be sustained, he would like leave to amend; or something of that sort.

CROSS EXAMINATION.

Examined by Mr. Higgins:

Q. I didn't appear as one of the attorneys in that case on the pleadings?

A. I don't recall definitely, but I should think that was very likely so, Mr. Higgins.

Q. The defense noticed the demurrer for argument?

A. I presume so.

Q. And it had been noticed for a day prior to this time, do you recall?

Mr. Mercer: I object to that as not the best evidence.

A. I have no distinct recollection of it, but I presume that is a fact.

Q. At the time it was called for argument, Mr. Hutchinson, the attorney for the plaintiff, was not in court; do you remember?

A. John T. Hutchinson, as I remember, was attorney for the plaintiff, or one of the attorneys for the plaintiff, and didn't appear at the time of the argument.

Q. Do you recall that the argument was continued on account of Hutchinson's absence, and re-set for the date the argument was made?

A. I don't recall that circumstance.

Q. Do you recall that on the day the argument was made, I stated in open court that I couldn't find Mr. Hutchinson and if the Court insisted upon hearing—in effect I said I could not ask the Court for a further delay?

A. I don't remember any such statement being made.

Q. Do you remember of me telling the Court that I knew absolutely nothing about the case?

A. No, I don't remember any such statement.

Q. It is a fact that I made absolutely no argument at that time?

A. My recollection is that you did make, as I stated, a brief argument and stated to the Court that you would stand upon the complaint.

Q. How long, Judge, do you suppose I talked to the Court?

A. It would be impossible for me to state.

Q. Half an hour?

A. I would simply be guessing. I have no distinct recollection of any extended argument; my recollection is simply that you made a brief argument. I have in mind—I might volunteer this—that you came to my office, Mr. Higgins, and talked with me about this case a day or two, or two or three days, before the argument and told me that you were in the case. This is in my mind.

Q. Is that recollection clear, or otherwise?

A. It is pretty prominent in my mind that you and I talked about that case and that you told me at that time that you were in the case.

Q. At that time did I call with a view to getting you to pass the hearing until Mr. Hutchinson could take care of it?

A. I have no recollection about that, but I simply have in my mind the fact that you came to my office

and talked with me about this case and told me at that time that you were in it on behalf of the plaintiff.

Examined by Mr. Jackson:

Q. Judge Lancaster, did you have typewritten brief or argument which you used in the course of your argument in the demurrer of this case?

A. I did, and had quite an extensive brief.

Q. Have you that brief, or a copy of it, now?

A. I would say that Mr. Mercer spoke to me day before yesterday about this matter and I went and looked the matter up and I find the case of Elizabeth M. Price against Marie Dewey Smith was entered on our books and a small file made for it, and the small file I find, and that the papers from this were transferred to what we call a large file, a large envelope, and the large envelope I could not find.

Q. Do you think by further search you could find it?

A. It is barely possible I could find it. If you will allow me to state, it is quite impracticable for me to find those files, on account of my change of firm and the moving of those old files. I know that I had quite an extensive brief and on account of the accumulation of papers, the case was transferred from this small file envelope to a large file envelope and I made search yesterday and day before yesterday and last night at my house for that file, but have not been able to find it.

Mr. Jackson: I think I will ask you to make such further search as you think might lead to the discovery of it, and in case you find it we may take some further

terstimony and perhaps we may desire to offer the brief in evidence. Have you a copy, Mr. Mercer?

Mr. Mercer: No. I tried to find Judge Lancaster's copy when this suit was started out there and asked him about it then, but he could not locate it.

Q. Do you remember, Judge, at the time that brief was printed, were there several copies—were there several carbon copies printed of it?

A. I have no distinct recollection of it, but should say from my usual practice, that two or possibly three carbon copies were made.

Q. Have you any recollection as to what was done with the copies of that brief?

A. No, I have no distinct recollection. I would only be able to state what would be the usual custom in such cases. This matter hasn't been called to my attention until day before yesterday; except, might state that Mr. Mercer, several weeks ago, told me that Mrs. Price had commenced another suit out in Oregon, but made no examination at that time for my papers.

Mr. Mercer: I would say, if it would aid you in that, that I went to the court house to see if I could find a copy there. If we can find it I would be glad to have it.

Q. Do you think there is any possibility that Judge McGee might have taken that file?

A. I should suppose not. It was finished at that time and it was a matter I had charge of, and I wouldn't have supposed that he would take it. If so, it was a mistake.

Q. Do you remember whether in your brief in that argument upon the grounds specified in the demurrer were enumerated, with some argument as to each?

A. My recollection is that there was no argument upon the grounds of the demurrer except the one that I argued, and I know my brief—my recollection is that my brief and my argument were confined wholly to the proposition that the complaint did not state sufficient facts for cause of action, and whether or not Mr. Mercer actually discussed any of the other grounds, I have no distinct recollection.

Q. I notice among the grounds of the demurrer one is that Donald MacLean was not joined as a party plaintiff?

A. I couldn't say without looking up the demurrer whether that was in or not. I didn't remember that, although I remember there were other grounds.

Q. Also, one ground was that plaintiff had no legal capacity to sue, based, I suppose, on the fact that she was at that time a married woman and her husband was not joined with her as plaintiff. Are you able to state distinctly or not that ground of the demurrer was included in the discussion or argument in your type-written brief?

A. I should say not. My recollection is that I confined myself to that one ground. I think we divided our work and that I took that part of it and argued that question alone, and my recollection, as I say, is that Mr. Mercer had charge of those other points and if any argument at all was made it was made by him.

Q. There was a fourth ground; my impression is

that there was an objection to the jurisdiction of the Court. Have you any recollection as to that?

A. I could only say that I am very sure that I did not argue that.

Q. If I understand you, Judge, the main ground that you urged was that the alleged contracts were oral and not in writing. Is that right?

A. That was taken as a stipulation and the whole argument was based upon the proposition that all three agreements set up in the complaint were oral.

Q. Your contention was that no action could be maintained on oral agreements of that kind?

A. Well, I should say, I haven't tried to refresh my recollection on it and haven't been able to find my brief, but my present recollection is that my contention was that the action could not be maintained on those agreements.

Q. Because they were not in writing?

A. I am reasoning a little when I say that, because I haven't been able to recall definitely, not having been able to find my brief.

REDIRECT EXAMINATION

By Mr. Mercer:

Q. You may state, Judge Lancaster, why your files are incomplete at the office?

A. As I stated, the original file in this case was the usual small envelope. As the papers accumulated, it was transferred from the small envelope file to the large flat envelope file, and in January, 1910, upon the dissolution of the firm of Lancaster & McGee, all the old

files of finished cases, on account of the congested condition of our vault, were taken out and put in my garage at 3145 Second Avenue South; and last fall, in September, I had those files removed to my garage at my residence, 2108 Pillsbury Avenue. In these movings all the files have been disarranged and up to date I have not been able to find the large file, which undoubtedly contains all the papers which I ever had relating to this case, including my brief on the argument of the demurrer. I have had a search made at the office for this file, but to date have been unable to locate it.

Q. State whether or not I asked you to find that brief for my use?

A. You did.

Q. You may tell us when the decision was made with respect to when the argument was completed, and what the practice would be with respect to giving briefs to the Court at that time?

A. I am sure that I prepared at least two copies of my brief, probably three. We argued the demurrer on the 21st and 22nd of January, 1909, and at the conclusion of the arguments the Court announced his decision in favor of sustaining the demurrer. While it would be my usual practice, had the case been taken under advisement, to submit a copy of my brief to the Court and also to opposing counsel if he should request one, under the circumstances of this particular case it is altogether likely that no copy was handed to the Court, because of the decision from the bench.

Q. There was never any controversy about Mr. Higgins appearing for the plaintiff at the hearing?

A. None whatever. I have a distinct recollection that Mr. Higgins appeared at the time of the argument and was present while the arguments were made, and I also have a distinct recollection that he talked with me before the arguments about his being one of the attorneys for the plaintiff.

Q. And you also remember, I suppose, that we treated him as the party who was really representing the plaintiff, with respect to that argument?

A. He was so treated at the time of the argument by everybody connected with the case.

Q. As to the notices of bringing on the argument, I suppose you would not remember definitely about them and would rather depend upon the notices themselves?

A. Certainly. I have no recollection about which side brought on the hearing.

Q. Do you recollect at this time that there was a motion made by the plaintiff to the effect that the demurrer should be stricken out as being frivolous, before it was argued?

A. I have no present recollection of such a proceeding.

Q. State whether or not you were originally retained as attorney for the defense in that case, or how you came into it?

A. My recollection is that some days, perhaps several weeks after the case was started, General Wilson and, I think, Mrs. Smith came to see me and retained me as associate counsel with Messrs. Wilson & Mercer, who were the regular attorneys of the defendant.

It is stipulated and agreed by and between the parties hereto, by their respective counsel, that the reading and signing of said deposition by the said witness is hereby expressly waived.

LAST WILL AND TESTAMENT

OF

PETER B. SMITH.

(Defendant's Exhibit 1 S. K. P.)

I, PETER B. SMITH, of the City of Minneapolis, County of Hennepin and State of Minnesota, mindful of the uncertainty of human life, do make, publish and declare this my last will and testament, hereby expressly revoking all former wills by me made.

After the payment of my just debts and funeral expenses and the expenses of the administration of my estate,

FIRST: I give and bequeath to my nephew, Arthur Colfax Smith, my membership in the Chamber of Commerce of Minneapolis, Minnesota, subject to the rules and regulations of said Chamber in respect to certificates of membership and the transfer thereof.

SECOND: I give and bequeath to my adopted daughter, Elizabeth Marion McLean, nee Elizabeth Marion Ailes, the sum of five thousand (\$5000) dollars.

THIRD: I give and bequeath to Elizabeth Marion MacLean and to my wife, Marie Dewey Smith, in trust, without bond, for the use and benefit of Donald Mac-

Lean and Robert Dale MacLean, minor children of my said adopted daughter, the sum of five thousand (\$5000) dollars; and I do hereby authorize and empower my said trustees to use such portion of said bequest, or the increase thereof, as may be reasonably necessary for the education of said Donald MacLean and Robert Dale MacLean. It is my will that the money so bequeathed shall be kept, as far as possible, invested for the use and benefit of said minor children until the youngest shall become twenty-one (21) years of age, at which time the amount then remaining of said bequest shall be paid over to them, share and share alike; provided, however, if more shall have been paid out by my said trustees for the use and benefit of either of said minor children than for the other, such excess shall be deducted before a division of the remainder, so that in all respects they shall, as nearly as may be, share equally in said bequest.

In case of the death of either of said children before arriving at the age of twenty-one years, it is my will that the whole of said bequest remaining shall be paid over by my trustees to the survivor on his arriving at the age of twenty-one years; and in the event of the death of both of said children before arriving at the age of twenty-one years, the money so bequeathed to them then remaining shall revert to, and become a part of, my general estate, and go to my residuary legatees hereinafter directed.

In case either of my said trustees shall decease before said children shall both become of age, the other shall be the sole trustee, with all the power and authority hereby given to the two.

FOURTH: I give, devise and bequeath to my wife, Marie Dewey Smith, all the rest and residue of my estate, real, personal and mixed, wheresoever situated.

FIFTH: I hereby appoint my wife, Marie Dewey Smith, the executrix of this my last will and I request that she shall not be required to give bond as such executrix.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal, this 14th day of May, 1902.

PETER B. SMITH, (*Seal.*)

On this 14th day of May, A. D. 1902, the foregoing instrument, consisting of two (2) pages, typewritten, was signed, sealed and declared by the testator therein named, Peter B. Smith, to be his last will and testament, in our presence, who, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses to said instrument.

William Ballou, residing at Fargo, North Dakota.

Wm. B. Douglas, residing at Fargo, North Dakota.

(Copy)

(Defendant's Exhibit 2.)

LAST WILL AND TESTAMENT.

OF

PETER B. SMITH.

I, PETER B. SMITH, Of the City of Minneapolis, County of Hennepin and State of Minnesota, mind-

ful of the uncertainty of human life, do make, publish and declare this my last will and testament, hereby expressly revoking all former wills by me made.

After the payment of my just debts and funeral expenses, and the expenses of the administration of my estate:

FIRST: I give, devise and bequeath to my wife, Marie Dewey Smith, all my estate, real, personal and mixed, wheresoever situated.

SECOND: I hereby appoint my wife, Marie Dewey Smith, the executrix of this my last will, and I request that she shall not be required to give bond as such executrix.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal, this 10th day of January, A. D., 1906.

PETER B. SMITH, (*Seal.*)

On this —— day of January, A. D. 1906, the foregoing instrument, consisting of one (1) typewritten page, was signed, sealed and declared by the testator therein named, Peter B. Smith, to be his last will and testament, in our presence, who, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses to said instrument.
Clarence A. Brown, residing at Minneapolis, Minn.
H. C. Cook, residing at Minneapolis, Minn.

Foregoing, Defendant's Exhibit 2, duly proved, admitted to probate in Hennepin County, Minnesota, and duly authenticated.

(Defts. Exhibit 3)

(S.K.P.)

W. T. PRICE

Mill Valley, Calif., 11-1-06.

Mr. P. B. Smith

Dear P. B.

Enclosed please find my note, hope you will pardon the delay. The agreement is all ready, but as my father has gone to Los Gatos for a week or so, will have to wait for his signature. Will forward it immediately upon his return.

Yours very truly,

Ned.

(Defts. Exhibit 4)

(S.K.P.)

In the event of my death before the maturity of this note it is my wish that it shall not be considered of any value and returned to Mrs. E. J. Price as a bequest from me.

P. B. Smith.

(Defts. Exhibit 5)

(S.K.P.)

Minneapolis, Minn., September 13, 1907.

Received from Mrs. P. B. Smith that certain promissory note signed by Edwin J. Price, in the words and figures following, to wit:

"2000.00/100

Mill Valley, Cal., 10-15, 1906.

Five (5) years after date I promise to pay to the order of Peter B. Smith two thousand dollars for value received with interest at the rate of 5 per cent per an-

num from date and if the interest be not paid annually, to become as principal, and bear the same rate of interest. This note is negotiable and payable without defalcation or discount and without any relief or benefit whatever from stay, valuation, appraisement, or homestead exemption laws.

(Signed) Edwin J. Price."

In presence of Geo. P. Wilson.

Elizabeth Smith Price

Edwin J. Price.

(Defts. Exhibit 6)

(S.K.P.)

We acknowledge the receipt of said note in fulfillment of the request of said deceased and as a bequest from him, expressed by him in words and figures following:

"In the event of my death before the maturity of this note, it is my wish that it shall not be considered of any value, and returned to Mrs. E. J. Price as a bequest from me.

(Signed) P. B. Smith."

In presence of Geo. P. Wilson.

Elizabeth Smith Price,

Edwin J. Price.

(Envelope marked)

(Defts. Exhibit 7)

Copy of letter from P. B. Smith to E. A. Wright, Esq., Canton, Ohio, *re* proposition for maintenance of Bess and children.

(Defts. Exhibit 8) *Copy*

Mpls., Minn., Feb. 16-1903.

E. A. Wright, Esq.,
Canton, Ohio.

My Dear Uncle Ed.—Herewith please find a letter from Bess, which indicates that she is cured of her stage folly, and it now becomes a question what to do with and for her and her children. The way she has treated me, I can hardly be expected to take her back into my home again, and yet I want to do all I can to enable her to live properly and bring up the children as they should be brought up. Bess has absolutely no idea of the value of money, neither has she any sense of obligation, or even honesty so far as money is concerned, but she has many good impulses and she dearly loves the children and wants to have them and she has certainly shown good judgment in discipline of the children. She is evidently very sick of her present life and it seems a good time to bring about a change that would be to her advantage and that of the children. The question is, what to do and how to do it. I am now giving her an allowance of \$15.00 a week and taking care of the children, which means clothing them and keeping a nurse for them, so I presume it is safe to say that she costs me a thousand dollars a year or more, and I would be willing to pay that amount to have her and the children taken care of, but it would have to be disbursed through you or some other reliable person. Could you and your family find it in your hearts to take her and the children into your family and let me send to you each month say \$85.00, and you charge a reasonable amount

for board and pay the balance over to Bess as she needs it to buy clothing for herself and children.

There is much more to say on the subject, but perhaps I have said enough at this time, and I wish you would give the matter serious consideration and write me fully what you think of it. If Bess were the considerate, thoughtful woman she should be, she could always have had a good home with us for herself and the children, but the way she has acted we could hardly think of taking her into our home and hearts again. The children are very dear to me, and it will make a big void in my heart to have them go, but it seems best that it should be so; but if I prosper as I hope to, I shall at the proper time provide for their suitable education.

With kind regards to yourself and Aunt Annie and Hattie, and hoping for some suggestion that will settle this question for Bess and the children, I remain as ever,

Sincerely yours,

P. B. Smith.

Depositions duly returned and certified.

(Complainant's Exhibit C)

The St. Anthony & Dakota Elevator Co.,

Minneapolis, Minn., Feby. 27th, 1904.

Dear Bess—

Herewith N. Y. Dft \$100 for March. I don't think I have heard from you since I sent you money a month ago. You should at least acknowledge receipt of letters containing money, and I am always anxious to hear from you and the boys. Please write at once and let me know

how you are all getting along. With much love to the boys,

Yours,
Dad.

(Complainant's Exhibit C-1)

The St. Anthony & Dakota Elevator Co.,
Minneapolis, Minn., Nov. 26th, 1904.

Dear Bess—

Yours with the pictures and letters from Donald and Bobby received a few days ago, and I was very glad to get them all. Tell the boys I will try to answer their letters soon. I enclose N. Y. draft \$100.00 being for your December allowance. I think we will send a small Christmas box for the boys and I will send you a special check for your Christmas. With much love and kisses for Donald & Bobby,

Yours,
Dad.

(Complainant's Exhibit C-2)

The St. Anthony & Dakota Elevator Co.,
Minneapolis, Minn., Dec. 9th, 1904.

Dear Bess—

We will not send much of a Christmas box for the boys this year. I thought best to send you some money and you can buy such things as you want for yourself and Donald & Bobby. I enclose draft for \$50.00 for that purpose. Dewey and Hannah made a bath robe for each of them, also bought some slippers and a few other light articles which we will send by express next week. With much love to Donald & Bobby,

Yours,
Dad.

(Complainant's Exhibit C-3)

The St. Anthony & Dakota Elevator Co.,
Minneapolis, Minn., Dec. 20th, 1904.

Dear Bess—

I sent the ring a few days ago and hope you will receive it before Christmas. I told Eustis Bros. to prepay the express and presume they have done so. Let me know if you receive it all right. I think Dewey also sent you something—presume she wrote you. With much love for Donald & Bobby and wishing you all a merry Christmas, I am,

Yours,

Dad.

(Complainant's Exhibit C-4)

The St. Anthony & Dakota Elevator Co.,
Minneapolis, Minn., Dec. 30th, 1904.

Dear Bess—

I can't tell you how much I appreciate the picture of the dear boys which you sent me for Christmas. It is worth more to me than all the other presents I received. I enclose draft for \$100.00 for January. With much love and lots of kisses for Donald & Bobby.

Yours,

Dad.

(Complainant's Exhibit C-5)

The St. Anthony & Dakota Elevator Co.,
Minneapolis, Minn., Jan. 27th, 1905.

Dear Bess—

Dewey and I just returned this morning from Kansas, where we have been for ten days visiting my sister. We had a very good time but it seems good to be home

again, even though the weather is cold—12 below zero this morning. We are well and hope you and the boys are also well and happy. I enclose draft for \$100.00, your Feby. allowance.

With much love and lots of hugs and kisses for Donald & Bobby,

As ever,

Dad.

(Complainant's Exhibit C-6)

The St. Anthony & Dakota Elevator Co.,
Minneapolis, Minn., July 22nd, 1905.

Dear Bess—

Your good letter just received and I hasten to answer it immediately. From what Arthur tells me of Mr. Price I think he will make you a good husband and a good father to the dear boys. And from my experience with the name MacLean I should be glad to have the boys named "Price," which I am sure is much better. You know how dearly I love Donald and Bobby and that I will always take an interest in them. I do not suppose Mr. Price would want me to contribute to your support after you are married, but with the boys it is different, and I should say after your marriage it would be right for me to send you \$50.00 per month for the boys, which I will be glad to do.

I am glad to give my consent to your marriage, because I think it means happiness to all of you. I should be glad if Mr. Price would write me personally. In the meantime I enclose a N. Y. Dft for \$200, \$100 for your Aug. allowance and \$100 as a wedding present which

you can use in getting some new clothes. With much love to the boys, as ever,

Dad.

(Complainant's Exhibit C-7)

The St. Anthony & Dakota Elevator Co.,
Mineapolis, Minn., Dec. 14th, 1906.

Dear Bess—

I received your letter sometime ago and delayed answering because I have been very busy and not very well. I don't want to continue a monthly allowance and don't think you should ask for it.

Dewey has talked about sending Christmas presents to the boys. I told her what you said about their bath robes being good for another year. The girl she has now is not much on the sewing business so I said to not think of making anything for the boys this year, that I would send you some money to buy them something as coming from Dada and Aunt Dewey. I accordingly enclose draft for \$100, but would suggest that you don't spend very much on Christmas and keep the most of it to use in furnishing your cottage. Let me know how you get along and perhaps I can help you a little more when you are ready to move. With much love to all and a merry Christmas,

Yours,

Dad.

(Complainant's Exhibit C-8)

P. B. Smith,

July 30, 1906.

Dear Bess—

I have your favor of July 9th, which I failed to answer because it got mixed up with some other papers.

I certainly do remember Bob's advent very well, though I had forgotten the particular day. Sorry, as I would have liked to send him something, if only a telegram.

Yes, Emily came back. We found her here on our return from Mill Valley and she is just as glad to be back as we are to have her.

I enclose draft for \$50.00 for August. With lots of love and hugs and kisses for Donald and Bobbie,

As ever, yours,

Dad.

(Complainant's Exhibit C-9)

P. B. Smith,

Minneapolis, March 1, 1907.

My dear Bess—

Your good letter just received. Glad to know that you are settled in your new home.

In regard to the Seattle lots, I enclose you two letters, one received January 4th and one January 28th. It appears that, temporarily, there is a lull in the demand for property out there, but I feel sure we will get an offer for this property within the next two or three months. Please read and return these letters. I told Mr. Edwards that whenever he could give me \$450.00 net for the two lots to let them go, and I believe that we will get that price for them.

Yes, I have not forgotten that Donald's birthday comes on the 8th of this month, and I want him to have something from me on that day. I enclose a draft for \$25.00 and I think you had better spend about \$5.00 for

his birthday and you can use the balance for something for the house.

With much love to the boys and kind regards to Ned,
I remain,

Yours lovingly,
Dad.

(Complainant's Exhibit C-10)

P. B. Smith,
September 10, 1906.

Mr. E. J. Price,
Mill Valley, California.

My dear Ned:—

Your valued favor of the 5th received and contents carefully noted. I really wish that I were in position to do as you ask. At present, however, it is out of the question. I have some negotiations in hand at present which may culminate favorably a little later on, in which event I might be able to do as you request. When the time comes it will certainly afford me great pleasure to do so.

With love to Bess and the boys, I am,

Yours truly,
P. B. Smith.

(Complainant's Exhibit D)

THE WESTERN UNION TELEGRAPH
COMPANY

Received at

Minneapolis, Minn 8/20

Mrs. Ned Price

P D died suddenly heart failure funeral Wednesday; letters follow.

(Complainant's Exhibit E)

JESSIE CAREY SMITH

Stenography and Typewriting

Minneapolis, August 29, 1907.

My dear Bess:

I have been planning for weeks to write you; and isn't it just too bad that, when I do, it is to be an account of "Dad's" death? But I know you are anxious to know the particulars; and Dewey asked me to write you and to say that she will do so, too, a little later.

Dewey and P. B. were on a business trip East; stopped off at Mt. Washington (Bretton Woods) N. H., on their way to Montreal—just to break that rather tedious ride; they had walked a little way up the mountain to the big Inn there; P. B. complained of headache, and of feeling ill; wished to get a carriage to ride the four or five blocks to their hotel; they got him into the doctor's office, just a few feet from where he was taken ill; he became unconscious in a few moments and died in two hours.

It was a great shock to us all; for none of us, I think, realized that P. B. was in any condition that would lead to his death in the near future. He had been claiming to feel particularly well, for the few weeks immediately preceding; the last time I saw him, which was the night they left here, he was bubbling over with good spirits, and had never seemed to feel better.

I know that you must feel, with many of the rest of us, that you have lost a dear friend. I wish, though, that you might realize just what a loss P. B.'s death is to so

many people; there are literally scores of people here, and outside of the city, who take it as a personal loss. I think he was a man who drew from his friends a peculiar quality of affection, and that he was very dear to an unusual number of people.

He died on Friday, the 16th of August, at one o'clock P. M. Dewey said that, the night before, at dinner, she lifted her glass to him and said "Well, here's Ho, 'Dada' "; of course, this brought Donald to mind, and P. B. began talking about both the boys, how much he thought of them, and said he would give a great deal to see them. He was certainly very fond of them; and very proud of them, too.

Dewey is still at the house, and I think she will stay there this winter; there seems to be no good reason for making any change.

As for myself—I guess there is nothing new or interesting. Dewey told you that the children and I are living alone; and we are very happy and contented. Of course, I am sorry to be away from them so much as I am obliged to be, under the circumstances; but there are other things that are worse; so I don't know as I have any reason to complain.

I feel rather embarrassed to think I have never said "Thank you" for my shopping bag at Christmas; but I have carried it daily, and it has been a great convenience; it must be, also, an unusually good one, for it still shows very little signs of wear; and you know it must get good hard usage, in my case, going out every day, and many times a day. This is simply an instance of what procrastination—that "thief of time" will do. For I have

thought, dozens of times—"tomorrow I will write Bess." However, possibly the circumstances in my case are of such a nature as to serve for something of an excuse. At any rate, I seem to be making up for it now, in the length of letter.

Constance and Marian are fast growing up; of course, I think they are the best ever; we have the very best times, and I think you would be very fond of them, if you knew them now. Some day (I have long been saying this) I will send you some kodak pictures, showing them at their best—and worst.

I suppose you are happy now that you have a "bungalow" at last—the wish of your heart in olden times, I remember. Do you remember "Mac Martin"? He claims to be a schoolboy sweetheart of yours—or to have been—but maybe he is only a pretender. At any rate, don't think of him now as a youthful eighth-grader, for he is quite grown up and in business for himself—and your elderly cousin does work for him—that's me.

Well, Bess, dear, I hope you are just as happy as can be in your home; do try to have it a happy home; there's nothing in the world that is so good and lasting as the influence of a happy, good home. We try to have it so—although, you see, it's double work for me; but the girls and I are great chums. You would be surprised, I think, to know of the many little instances which Constance remembers about Bess. But Marian, I think, seems to have the idea that you were once her "nursegirlbess." That is the way she says it.

Goodbye. I'm not going to write any more; I am just like the girl who is unwilling to play the piano; just

get her started and she doesn't know when to stop.

Lots of love. Write to me, if you feel like it.

Sincerely,

Jess Carey Smith.

(Defendant's Exhibit 3)

Hotel Warner and Annex,
Cor. Cottage Grove Ave. & 33rd St.,
Chicago, Sept. 28, 1907.

Mrs. Peter B. Smith,

Dewey—

We have had nothing but misfortune since we reached Chicago. We intended to leave here the next day but Bess broke down completely and has been in bed ever since. For the last 48 hours she has taken no nourishment. The doctor calls twice a day, he says she is simply a nervous wreck. There is the Battle Creek Sanitarium about two blocks from here and I want her to go there for a few days or a week. The doctor advises it. Now I am going to ask you to help me out if you will. Of course I have the tickets home, but as I have been under a very heavy expense this week I have nearly exhausted my resources. If you can let me have one hundred as soon as possible I will return it when we arrive home. The doctor is out just at present, otherwise I would send you his certificate of Bess' condition. Will mail it to you tonight. Hoping that you are well and can accommodate me, I am yours very sincerely,

Ned.

Address as above.

(Defendant's Exhibit 4)

North American Telegraph Company.

(Copy) Mail confirmation of telegram filed today.

September 30, 1907.

To E. J. Price,

Warner Hotel, Cottage Grove Avenue and 33rd
Street,

Chicago, Ill.

Sorry for your misfortune. Cannot do anything
more for you.

(Sgd) Mrs. P. B. Smith.

(Defendant's Exhibit 5)

Congress Hotel,

Chicago,

October 5, 1907.

Sixty days after date we promise to pay to Jessie
Carey Smith (or order) One Hundred and Fourteen
Dollars (\$114.00) with interest at the rate of 6% per
annum. Value received.

E. J. Price,

Elizabeth S. Price.

(Defendant's Exhibit 6)

Congress Hotel,

Chicago,

October 5, 1907.

Received of Jessie Carey Smith One Hundred and
Fourteen Dollars (\$114.00) which is amount covered by
note of this date, made by the undersigned to the order
of the said Jessie Carey Smith.

E. J. Price,

Elizabeth S. Price.

(Defendant's Exhibit 8)

W. T. Price,
Mill Valley, Calif.,

1-11-08.

Friend Jess,

Yours of the 1st received last week. Would have answered sooner but have had lots to do. Bess has not been well since we returned and two weeks ago she was taken very ill, have had the doctor once or twice a day since, also a nurse, she was a little better yesterday, so I let the nurse go. For three nights last week I did not have my clothes off, and to add to the situation on Friday both boys were taken with the chicken pox, of course they are not seriously ill but they are a lot of trouble. I will be unable to attend to the matter you wrote about, for the present, and cannot tell just how soon. Business here and in fact all over the Coast is very bad, the worst in years. The outlook is also bad until summer.

I will attend to your matter as soon as possible, but for the present I am very sorry, but it is impossible.

Yours respectfully,

E. J. Price.

(Complainant's Exhibit "F")

Minneapolis, Minn.,
June 26, 1909.

Mrs. Elizabeth S. Price,
1200 Second Avenue South,
City.

Dear Madam:

Mr. Dunwoody has turned over to me your letter to him of June 24th for the reason that this being his last

day in Minneapolis his time is exceedingly crowded and he cannot find the opportunity to reply in person. He has, however, talked with me quite fully concerning the contents of your letter and has outlined his ideas in regard to your affairs, so that I feel warranted in saying that this letter expresses his sentiments as fully as my own.

I have not seen Mr. Hartzell since his return, but am not surprised at the position he takes in regard to the uselessness of conferring with your attorneys. Our position in regard to that is precisely the same. We would have no confidence whatever in any predictions made in regard to the outcome of the case by an attorney who will take a case on a contingent fee, and we can see no object in talking with them about the matter, because we feel absolutely certain that Mrs. Smith can neither be cajoled or threatened into making any settlement of this suit. We feel certain that by your course in trying to break the will of Mr. Smith you have put yourself beyond the pale of her sympathies, and that the only hope of accomplishing anything in an appeal to her lies in reaching her sense of justice concerning the education and maintenance of your boys, in regard to which I understand she has acknowledged several times that Mr. Smith intended some provisions should be made for them and relied upon her to carry out his wishes. We believe her position is that your course has made it impossible for her thus far to do anything along this line and that nothing of this kind could be done until this lawsuit was finally disposed of. In any event we do not anticipate that she

would be willing to pay over a lump sum of money to be handled by you or your attorneys.

We should suppose that if she can be persuaded to do anything it would be something along the line of placing your boys in a good school where they would be well taken care of and where the necessity of their education, which is becoming urgent, would be fully met. Of course we have no means of knowing whether she would even do this, but we would be greatly disappointed if she refused to do anything of this kind. It would not be surprising, however, if she made it a condition that these legal proceedings should be discontinued before undertaking the education of your boys.

It is our opinion that if such an arrangement could be brought about it would be altogether the best thing possible for the future of your sons, and that, of course, is dearer to you as a mother than anything else on earth. Furthermore, it would leave you unhampered to earn your own living, which you have thus far not been able to do, presumably because you were so tied down by the care of your children that you could not give up your entire time to any employment. We can conceive of no other reason why a woman in the prime of life and in reasonably good health and with the advantage of an appeal to the sympathies of people, and with friends to speak a good word for her, could not within a reasonable length of time secure employment, by means of which she could, with strict economy, maintain herself in a fair degree of comfort. Innumerable women have to do this, and do it successfully even when they have no

friends to fall back upon in case of emergency, as you have thus far had.

Yours truly,

C. A. Brown.

United States of America,
District of Oregon.—ss.

I, Charles E. Wolverton, one of the Judges of the District Court of the United States for the District of Oregon, before whom the above entitled cause was tried, do hereby certify that the foregoing statement of the evidence adduced and proceedings had upon the trial of said action, having been presented to me on the 4th day of August, 1916, and the same having been examined by me and found conformable to the truth, the said statement contains all the evidence introduced and all the proceedings had upon said trial, including the depositions, exhibits, and objections to the introduction of testimony, the rulings of the court thereupon and exceptions taken by the respective parties, except as hereinafter stated, and said statement is now signed and approved as and for the statement of the evidence introduced and proceedings had upon said trial, and the same is hereby ordered and directed to be made a part of the record in said cause to be incorporated in the transcript on appeal, and at the request of both parties said testimony is so certified in full in the original form of questions and answers without reduction.

The exception noted above is this, that the originals of defendant's exhibits 1, 2 and 7, and the stipulated testimony of Mrs. Duncan now on file and part of the

record in this cause, are not hereto attached, but may be deemed a part of this statement of the evidence, and may be hereafter attached to this statement.

Chas. E. Wolverton,
District Judge.

Filed August 4, 1916.

G. H. Marsh, Clerk.

The said stipulated deposition of Mrs. Duncan, above referred to, is in words and figures as follows, to-wit:

Stipulation as to evidence for the purpose of preventing taking the deposition of Mrs. F. C. Duncan, who resides at Fargo, North Dakota.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto through their respective Counsel that this stipulation may be treated as evidence given in said cause by Mrs. F. C. Duncan to the following effect:

1. That the said witness is the mother of the defendant herein.

2. That she had resided in Fargo, North Dakota, at the time Peter B. Smith lived there, and their families were intimate friends; that she frequently visited at his house in Minneapolis after he married her daughter the defendant.

3. That within a short time prior to the marriage between said Peter B. Smith and the said defendant, this witness had a conversation with said Peter B. Smith in which he told the witness that he had had his will prepared by Colonel Douglas leaving most of his property

to her daughter and that he was very happy to do so; that he wished to have his wife well provided for; that Mr. Smith stated that he had provided liberally for his daughter, Mrs. MacLean, and had given her about all he cared to; that he wished to have his wife receive most of his property and if she could not he would not marry her.

4. That the gentleman mentioned as Colonel Douglas in the conversation with Mr. Smith was William B. Douglas, who witnessed the will of said Smith May 4, 1902.

5. This stipulation is made to take the place of evidence, but with the express understanding that the plaintiff reserves the right of objecting to the substance of all portions thereof as if the witness were present and properly interrogated to bring out the foregoing facts.

Dated April 16, 1915.

A. B. Jackson & Arthur M. Higgins,
of Counsel for Complainant.

H. V. Mercer,
Solicitor for Defendant.

Filed April 20, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on the 4th day of August, 1916, there was duly filed in said Court and cause, a Praeipie for Transcript, in words and figures as follows, to wit:

PRAECIPE FOR TRANSCRIPT.

To George H. Marsh, Esq., Clerk of said Court:

Will you please incorporate into the transcript upon

appeal of the above entitled cause the following portions of the record thereof, to-wit:

The bill, answer, all of the statement of the evidence certified by the court, the opinion and decree of the court, the assignment of errors, and the petition and other papers pertaining to the appeal.

Yours respectfully,

Wm. H. Hallam,
Solicitor for Complainant.

Copy of the within praecipe received this 4th day of August, 1916.

Wood, Montague & Hunt,
per Montague.

Filed August 4, 1916. G. H. Marsh, Clerk.

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on appeal in the case in said court in which Elizabeth M. Price is plaintiff and appellant, and Marie Dewey Wallace is defendant and appellee, in accordance with the law and the rules of court and in accordance with the praecipe for transcript filed by said appellant, and that the said transcript is a full, true and correct transcript of the record and proceedings had in said Court and cause, designated by the said praecipe to be

included therein, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is \$., for printing said record and that the same has been paid by said appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Portland, in said District, this day of August, A. D. 1916.

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Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELIZABETH M. PRICE,

Appellant,

vs.

MARIE DEWEY WALLACE,

Appellee.

APPELLANT'S BRIEF.

Upon Appeal from the District Court of the United
States for the District of Oregon.

WM. H. HALLAM,

Solicitor for Appellant,

Filed

SEP 8 - 1916

F. D. Monckton,

Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ELIZABETH M. PRICE,

Appellant,

vs.

MARIE DEWEY WALLACE,

Appellee.

APPELLANT'S BRIEF.

Upon Appeal from the District Court of the United
States for the District of Oregon.

STATEMENT OF THE CASE.

I.

Peter B. Smith, of Minneapolis, died without issue, leaving the defendant, as his widow and sole devisee. With no child of the blood, he left two family branches by marriage. The later branch consisted of this defendant, childless and alone. The earlier branch consisted of the complainant and her two infant sons. The complainant was not Mr. Smith's natural daughter. She was the daughter of his wife. At the age of fourteen, she came to him with her mother, whose hand he had sought in marriage.

After living happily with Mr. Smith seven years, the devoted mother passed away. The complainant found

in Mr. Smith an indulgent father, and the memory of the mother, after her death, solemnized his thoughtful care of the child. The only child of his departed wife, she was the only child of his own, and nine years after the original taking, if we may permit Mr. Smith to speak for himself, he proclaimed her in solemn writing as "*my adopted daughter.*" (Rec. pp. 585-586.)

To the same effect, five years later, is Smith's last parental letter—the last that can be found—written a *short time before* his sudden and untimely death. Will counsel frame a better parental model? (Rec. pp. 597-8.)

"March 1, 1907.

"My dear Bess: Your *good* letter *just* received. Glad to know that you are settled in your new home. . . . yes, I have not forgotten that Donald's birthday comes on the 8th of this month and I *want him to have something from me* on that day. I enclose a draft for \$25.00, and think you had better spend about \$5.00 for his birthday, and *you* can use the balance for something for the house. With *much love* to the boys, and kind regards to Ned, I am,

Yours lovingly, Dad."

It is claimed that at the time he wrote this letter Mr. Smith had *already disinherited this daughter and her children,—had already cast them off forever without a penny*; yet in that same thoughtful and solicitous manner he had been writing and remitting to the complainant

from year to year. His last letter before this one contained \$100.00 and nearly every letter \$100.00 (Rec. pp. 596 and 592-98). So while the complainant was not Mr. Smith's natural child, if we may employ the coinage of the Supreme Court of Minnesota, she was "*equitably equivalent*" thereto, and in his will her name does not appear.

A few months after Mrs. Smith's death, Smith quarreled with the father of these babes, turned him out of doors, financed his divorce, reclaimed the daughter, with her offspring, into his house and home, and *contracted with her that all he had would be hers "when he was gone."* The ejected husband is today a prominent surgeon at Carson City, Nevada, with a new wife and family. These helpless people have been defrauded in ghastly form. Smith's personal grievance caused that fateful separation, but he was not the man to slink, with craven heart, from all protection or insurance of the one child he had doubly appropriated and confessed.

Smith never forgot that he was of age when he ventured that interference, and more than that there is law, and to spare, that *forbids* him to forget.

May we first briefly indicate our position in point of fact and law?

This suit is brought to enforce a trust in two-thirds of Mr. Smith's estate, which trust the law constructs:

First. Upon the specific foundation of Smith's agreement with the complainant, after he expelled the husband and father. That agreement was modified when Smith engaged to marry the defendant, so as to embrace

only two-thirds of the estate, leaving the new wife her one-third.

Second. Upon the specific foundation of Smith's correlative *stipulation* with the *defendant*, shown to a moral certainty by several unassailed and accredited witnesses.

Third. Upon the broad foundation of an *equitable adoption*, which is *admitted without resistance*, in the defendant's oral examination, and *supersedes this species of will*, under the law of God and man, as that law is seen in every shining page of Holy Writ, and as that law is formulated in the Supreme Court of Minnesota and other jurisdictions.

Courts of equity do *not* decree the legal *status of adoption*, but they assert the power to adjudge, and they certainly *do* adjudge, the equitable "equivalent" of that status, in the matter of *property rights*.

Fourth. Upon the broad foundation of Smith's *total commitment*. If Smith turned his back in remorseless neglect, after dealing thus with a child, and her babes, equity in the very language of its powerful decisions, will *compel* him to "*stand upon and abide by the record he has made*," and the measure of the child's right, if not specified in a contract, is a "child's share," or *even contrary* to the literal meaning of a contract, in the recent words of the Supreme Court of California, the child's right is measured by "*what would be the child's share under the laws of succession*"; another entrance of the same doctrine of things "equitably equivalent."

The real essence of this fraud subsists in *conduct* and *not* in contract or specific performance of contract. The authorities soon reveal that fact, and they soon reveal the fact that the arm of equity is able to repel all such forms and intrusions of infamy.

The answer denies all *contract, stipulation, or parental conversation*, but it is impossible now to deny the documents that are unavoidable, and the enforced admissions that are conclusive. The decree refuses all relief.

This complainant *executed* unto Peter B. Smith one of the highest legal considerations rated in the judicial decisions. That consideration adhered not in naked promise, but in prolonged fulfillment. She gave a *life*. She gave three lives. For better, for worse, through fair days and foul, without original choice of hers, in all Smith's last fourteen years, she maintained the filial relation, and *while he lived*, Smith *never withheld* the compensatory protection which he had taught the young woman to expect; but from the moment and coincidence of his death, and throughout the complainant's long years of distress, not the feeblest parental token or remembrance has ever once escaped the clutch of this "good mother," and she says this was *Mr. Smith's will*. Here is her testimony:

"He was *very fond* of the boys when they were *babies* . . . but as they grew *older* and he *saw them but twice*, he seemed to *drift away more from them*, and he spoke of them *less from year to year*." (Rec. p. 454.)

But thereby the defendant dashed violently against

a contemporaneous monument. A letter of the *defendant's agent* shows Smith at dinner with the defendant, the very *last night before his sudden death*, drinking a *fond and proud and happy* toast to *these boys* (Rec. p. 600) and on this compulsion the defendant then and there actually *retracts* that gross family stigma, in words as follows:

“Q. I am asking you, Mrs. Wallace, with reference to this time the night before he died, *was he very proud of the boys*, as Mrs. Smith says in this letter?

A. *Yes, I think he was.*

Q. And very *fond* of them?

A. *Yes, very fond of them—they were handsome boys.*” (Rec. pp. 457-8.)

Her unbridled *assertion* could leave Smith dereliction *possible*, but her *retraction* renders it *inconceivable*. The difference between her representation and her confession is all the difference between a decree for the *defendant* and a decree for the *complainant*.

Suppose we had not *possessed* this letter—what would have checked this merciless, soulless, encroachment upon a child? The *boldness* to utter such testimony shall not deter the boldness to *accuse* it. Perjury more rank and vile, cruel and defamatory, never stood confessed by a successful litigant, and *when we remember*, what the courts hold, as of course, that this suit attacks, *not a will*, but *only* this self same woman's *defiance*, of an alleged trust *under* a will, it would be putting a premium upon crime, to say that *any statement* of

that woman, on that day is computable above a cipher in opposition thereto. She is *caught* trying to cover one crime with another. The sworn theory and foothold of her defense, *destroyed* by this collision, the defense itself ignominiously falls, and the maternal *intent* to *devour* the SUBSTANCE OF the child is alternately perpetrated and confessed *from the witness stand*. Here is crime and confession of crime, perjury and confession of perjury, by the defendant in this case—not *suspected* and *doubtful* but *exposed* and *conceded*. This case smells to Heaven—It smells to Heaven, and the infamy is only begun.

The complainant is *interchangeably designated by Smith* in the *defendant's own solemn documents here*, as "*daughter*," and "*my adopted daughter*." (Rec. pp. 609-585-6.)

That these terms *defined* the complainant's *status* in the *decedent's mind, to the hour of his death*, his letters plainly show, and the defendant, when directly questioned, *dare not deny*. "I never thought much about it," says the defendant. (Rec. p. 483.) Smith thought about it.

Cherishing the mother and children, then, until his death, with unstinted affection, according to the defendant's own written and oral concessions, what was Smith's parental conversation? *None*, says the defendant. *None* in all his last *four years*. *Her domestic falsities wax more and more abusive!*

She makes the following oath to the court:

"Q. Did you have any conversations with him

after *the complainant left Minneapolis* in 1903, in the interval between that time and his death in 1907, concerning the care of the complainant and the children and their future prospects or property?

A. *No.*

Q. Money matters, in reference to them?

A. No, not that I ever remember.

Q. You don't remember any at all?

A. *No, indeed.*

* * * * *

Q. Did he ever mention to you his *ideas* concerning them and their *prospects* after he died, if he should die; when he died?

A. *Never, never, no.*

Q. He never discussed with you, property matters in these four years with relation to the complainant and the children?

A. Mr. Hallam, Mr. Smith was a very reticent man in regard to his business affairs." (Rec. p. 452.)

That fiction *exceeds* the *other*.

In the period in question Smith assisted the complainant in building a home in Mill Valley, California, and sent her cheerful remittances from month to month and year to year, as his letters show. Besides that he talked and wrote freely to outsiders.

"When they went away we spoke of them very often in a casual manner," says the defendant on oath to the court. (Rec. p. 451.)

"The children are *very dear to me*, and it will make a *big void in my heart to have them go*," wrote Smith just before that time. (Rec. p. 592.)

Save as she *confesses*, she *falsifies*. The conscience of equity equals the conscience of the law, and equity adapts the constructive and accurate logic of the statutes enacted for the benefit of pretermitted heirs. And accordingly equity does in fact both *presume* and *execute*, a disposing intent, in favor of an only child of long, practical, virtual adoption, not mentioned in the will. It is so held in equity *without dissent*.

That presumption the defendant does not extinguish. She fans it into a flame, and besides this dominating presumption that a father *will* provide, the actual family relation of these parties shown in Smith's unconcealable visits, letters, and remittances, suffice to convince the mind that he *did* so provide, beyond any doubt that can be called *reasonable*. *Fathers have in rare cases, suffered total and chronic degeneration, but never when they HELD to such constant proofs of parental thought and protection. Never.* Counsel have searched in vain for such a case. *There is no such case. There can be no such case.*

For love is the *anti-toxin of disinheritance*. *Estrangement and inattention* must precede the desertion of an *only daughter*. That *must be true*, and if that be *true*, nothing more is *needed* and nothing *less* will *do*. This case is not a *matter of conflicting evidence*. This case is a matter of applying full wrought *adjudications* to a defendant's *full-wrung confessions*.

To that human certainty we *add* the *letter* and *witness* of *friend* and *foe*, truthful people, whose character and veracity no one has yet *ventured to assail*.

The following is from a letter of one who wrote to the complainant, as a friend of the defendant, after Smith's death, and who testified for the defendant, as a witness of Smith's will:—

“I understand she has acknowledged several times that Mr. Smith *intended some provision should be made* for them (the children), and *relied upon her* to carry out his wishes. . . . we should be *greatly disappointed* if she refused to do anything of this kind.” (Rec. pp. 605-606.)

That letter furnishes the *clue of the case beyond doubt*. It was excluded by the court and we shall discuss its exclusion.

In an interview at the office of her attorneys the defendant said to Wilbur Hartzell, now a fruit grower at Medford, Oregon:—

“Why, Mr. Hartzell, I think that is one of the finest thing P. B. ever did. *He left it all to my honor*, to take care of those boys, and *I propose to do it*, and see that they have good schooling. But I can't do anything for *Bess* now.” (Rec. pp. 133-136.)

According to the defendant's dates, this was just after *Bess* had *sued* her. (Rec. pp. 439-40.) Confusion of funds in its most detestable form is not legally safe. *The perpetrator must prove her share or lose her all*. This is elementary law and honesty, and I shall

presently show how Wilbur Hartzell is by *all* concerned, accredited and verified.

About the same time she said to Mrs. Florence Hartzell:—

“ . . . that she understood what P. B. wished, and she *intended to carry out his wishes*, regarding the boys.” (Rec. p. 154.)

On one occasion long after he married the defendant, Smith wrote to a relative concerning the boys as follows:—

“ . . . if I prosper as I hope to, I shall at the proper time provide for their suitable education.” (Rec. p. 592.)

The defendant says Smith was a man of his word.

The demon of fraud is in plain sight, and the burden of proof *shifts in law* to the *treacherous fiduciary* and *confuser of funds*, to *prove or lose her own share*.

Smith told Mrs. Hartzell:—“ . . . that he would not have insisted on her getting a divorce from the doctor if he had not intended to provide for her and the boys.” (Rec. p. 148.)

And he said to Mr. Hartzell of the boys:—

“I expect to take care of them, feel toward them as though they were my own boys and shall *always provide for them*.” (Rec. pp. 139-140.)

And to W. T. Price, Sr., father of the complainant's second husband, from whom the complainant separated, Smith said at Mill Valley, California, in May, 1906, **FOUR MONTHS AFTER HE MADE HIS**

LAST WILL, as the two men of similar age chatted at Price's store:—

“Mr. Smith said that he thought it just as well to leave money to the people he intended it for, in the hands of someone, a person that he was satisfied would use it in a proper way, and he said . . . ‘*Bess and the children are well provided*’ . . . meaning the two boys that were playing around outside. . . . He said, ‘I want to see that the boys have a good education and means to go into any business that seems best for them to when the time comes. If I live I shall see that it is done; and if not they are well provided for.’” (Rec. pp. 130-131.)

No one has ever yet had the courage to intimate that this defendant can be *exonerated, in equity, if Mr. Hartzell's testimony is true*, for, if so, our laws would be in league with malfeasance. She must tell what part of the fund is her own or lose it, of course. *The issue of veracity here is direct*, and any judicial review of the case should give *some idea what this pivotal testimony of Mr. Hartzell was*, and how he is to be *discredited*, and degraded,—surely by *something*,—a *little something*,—more than the *slow and evasive*, tottering denial of a woman who is caught, on oath, defaming and falsifying the heart and soul of her dead husband, and the children to whom she *ought* to be a mother! But as to all this the court is *silent*. *It is overlooked*,—Mr. and Mrs. Hartzell and Mr. Price, senior, are reputable people. *No one has, thus far, dared venture a word against their integrity and veracity*. In fact, defendant and her counsel

both are precluded, by their acts and good words, in this record (Rec. pp. 439-40, 140-44) from uttering against these people the slightest reproach. Their good name is a sacred right. It is as beautiful as perjury is hideous, and it is entitled to protection, in court, until it is forfeited by themselves. Their word imports ^{verities} ~~variety~~ from the sources whereby it is shunned. They are the unattacked Rock of Gibraltar in this case, these three people, W. J. Hartzell, Mrs. Hartzell and W. T. Price, Sr., They simply speak the truth. They reveal the very heart of truth as it is in God.

All that occurred before Smith's death, stands elucidated by these post mortem revelations. What is dark in Smith, this latest can illumine. What is low, it can raise and support, be it five, ten or fourteen years before he died.

Let us face the facts in this matter and this wicked woman will be *inexorably compelled* not only to *retract* the family *slanders*, but to *restore* the family *dues*.

Likewise, after he thrust out the complainant's first husband, Smith had promised the complainant that if she would stay and keep his home as his daughter while he lived *all he had would be hers when he was gone*, and she surely *did so keep his home*, the *pride* of the father, the *neighbors*, and the *servants*, a period of two years, literally from the hour of the mother's death to the hour *when* she was supplanted by this defendant. (Rec. pp. 563, 67, 528-29, 548-51, 195-98.)

The morning after Smith's engagement to the defendant, he said to the complainant at breakfast while

tears stood in his eyes, as recited by the complainant, " . . . that this would make some difference to me. He said instead of you having everything I have when I am gone you will have one-third, and the boys will have one-third, and Dewey (the defendant) will have one-third, but," he said, "I think we will have enough for all." (Rec. pp.212-13.)

After he married the defendant, he discovered that his daughter was a poor financier, and he certainly found a good one. Men sometimes entrust funds to their wives; generally they are handled faithfully.

The defendant's report of Mr. Smith is legally and morally unaccountable, and in point of law, the written and oral declarations of the decedent, to say nothing of those of the defendant, in conflict with the will, would throw upon the defendant the burden of *subsequent explanation*, even as against a family relation *more remote* than that of parent and child. The defendant sees this and *attempts* an explanation, which ends in disaster and confusion, and thereupon she retires at last to her extreme default and subterfuge, *actually in these words*:—

"No, I cannot account for it." "It was as much a surprise to me as it was to anyone." (Rec. p. 460.)

But when mighty wrongs seek perpetual shelter in equity, *surprise* will not stand lieu of *proof*.

In all cases, the shocking injustice of a supposed disposition, is, of itself, held to be far-reaching, independent factor of evidence and intendment against the projected wrong.

The magnitude of complainant's bulwark makes the defendant's masterpiece of confusion. The truth is, Smith *intended* to provide and he *did* provide. It is *presumed* that he did, and it is *clear* that he did. Smith said he did not want to continue *monthly allowances* for family support after the complainant married. No father does. He may have thought his obligation in that regard had ceased. But no father ever yet *disinherited* his only child and her offspring, *for all time* simply because she *married*, with his hearty approval. (Rec. p. 505.) No such case can be *cited*. No such case can *be*. No such idea is concrete in human affairs.

(1)

Upon all the facts before the court, a natural daughter, would recover her share as of course, and the complainant is her equitable equivalent. The fundamentals of the two cases are identical.

(2)

When the wolf has lingered long at the door of these tender wards, it is not *Smith* who willed their agony. It is the *substitute*, the hireling, who "fleeth, because he is an hireling, and careth not for the sheep." We scarcely need witness and incisive letter to put that truth beyond a peradventure.

(3)

Once the substance of the parental relation toward an only child is shown throughout a period of fourteen years, this defense is left without a mitigating trace,

without a gossamer shred of law or honesty. Courts of equity have not been accustomed to sit with complacent acquiescence, while such unblushing perfidy stalks in the streets.

(4)

The court below says the testimony must be "irrefragable." It *is* irrefragable, but from the latest decisions in Oregon and elsewhere, it is manifest reversible error to charge or demand that degree of proof in any civil case. The error is distinctly obvious.

(5)

The *truth* of this case, and the *righteousness* of this case are *not separated* by any mountain wall. Smith was a man of some weakness, some caliber, and some heart. He was a man his friends would gladly see again. And may we not as fairly cite a text itself, as its consequent array of fact and adjudication: —

"Whatsoever things are *true*, whatsoever things are *honest*, whatsoever things are *just*, whatsoever things are *pure*, whatsoever things are *lovely*, whatsoever things are of good *report*; if there be any virtue and if there be any praise, think on these things."

II.

The case covers a period of twenty-two years, but it seems competent to suggest within bounds, the main characteristics of its extraordinary history, its extraordinary defendant, and its extraordinary judicial decree.

The marriage of Mr. Smith and the complainant's mother occurred in 1893. Smith was then forty-three years of age, active in business, president of the Minneapolis Chamber of Commerce. From all accounts he was affectionate and generous. He never had a child of his own, and his abounding nature made no effort to conceal his joy that a child had come into his life.

The wedding trip comprised a visit to the World's Fair at Chicago. On the train, in the sunshine of that journey, the complainant called Mr. Smith, "Uncle Peter," as she had always done before. Smith drew her up into his arms and said, as the complainant testifies, "that I was to be his little girl and he was to be my father; that my name was to be Bessie Smith and not Bessie Ailes any more." (Rec. pp. 166-67, 170.) Our witness of this is Peter B. Smith. His corroboration is graphic. In the letter above quoted he *speaks* and *remits*, and *signs*, no whit less parentally and attractively than he talked in 1893. (Rec. p. 597.)

Coming from antecedents of slender means financially, Smith elevated the complainant to the luxury of his station. She was always known by the name of Smith. Near neighbors, deposing now *for the defendant*, "never knew her other name." (Rec. p. 548.) She retains a memorial of her French instructress inscribed to "Mlle. Elizabeth Smith." (Rec. pp. 172-73.) In the name of Smith she was known in school and college. Among the charter members of the fashionable Minnekada Club at Lake Calhoun, appear Mr. and Mrs. Peter B. Smith and Miss Elizabeth Smith. (Rec. pp. 175-76.) That keen delight found in watching the development of a

child, took natural possession of the new father. He always introduced the complainant as his daughter, and as "daughter," or "adopted daughter," she was always designated by him in his communication written and oral. (Rec. pp. 483, 564-65-66.)

Save temporary absences, the complainant lived at home from 1893, to her marriage in 1899. Her own father was not dead, but divorced. Very little is heard of him until 1899, when he had business at London, England, and requested that the complainant be allowed to take the trip with him. After some hesitation Mr. and Mrs. Smith granted the request. Upon that occasion, the two were Mr. Ailes and Miss Ailes, instead of Mr. Ailes and Miss Smith. On shipboard the complainant met Dr. MacLean, a young army surgeon, and the meeting ripened into a prompt engagement of marriage. This betrothal of a woman while on a sojourn, rankled in Smith's bosom so long, that three years later, he became an accessory to the like misdeed. (Rec. p. 405.) Smith was not a Pharisee. The junior offense was promptly condoned by the senior offender.

The consent of the parents was obtained by mail; the marriage occurred in London soon afterwards, and was confirmed by the parents at the first opportunity. Mrs. Smith met the young couple at Savannah, Georgia, and in June following they were cordially entertained by Mr. and Mrs. Smith, in a round of social functions, for two weeks in *Minneapolis*. A little later that year, the complainant made her parents *another* visit at *Minneapolis*, by reason of the illness of her mother, (Rec. p. 29.) and *on the heels of that call*, Mr. and Mrs. Smith,

in turn, spent *several months* with the young people at *Honolulu*, the following winter of 1899 and 1900, where Dr. MacLean, as army surgeon, was then stationed, and the complainant was expecting to give birth to a child. The child Donald was born March 8, 1900. It was the first childbirth in Mr. Smith's family experience, and a few days after the anxiety of that ordeal was over, the elder couple returned to Minneapolis. (Rec. pp. 182-83-84-85.)

Mrs. Smith's illness grew worse, and in a race against time, MacLean and wife and babe reached Minneapolis in June, 1900, a few hours before Mrs. Smith's death. (Rec. p. 187.)

Thus the family contact was as steady and admirable as any could very well be. But *no meeting, no communication*, of parent and child does the court notice in his history of those sixteen months, dating from the complainant's marriage to "the death of her mother."

Here is the court's recital:—

"She returned with her husband soon to the United States, and accompanied him as he was transferred from post to post, but later returned with him to the home of Smith in Minneapolis. . . . The immediate cause, however, of their coming to Minneapolis, was the illness of the plaintiff's mother. . . . After the death of her mother, which occurred on June 12th, 1900, the day of her arrival in Minneapolis, it was arranged that plaintiff and her husband should live with Smith, etc." (Rec. p. 100.)

That itinerary errs not in one thing, but in *all material things!*

There is only one relevant purpose of this history, and all that is *relevant* has been judicially *overlooked*. The relevant purpose is to present these parties in their true relation. That function is not only important, but *conclusive*; for that relation once displayed in its parental character, from beginning to end, the idea of brutal abandonment, involves a contradiction that *can not be intelligibly received*.

Such erroneous schedules as those of the opinion would cause train dispatchers to send thousands to their eternity. It is *grievous* error to consider this complainant as moving from military "post to post," at a time, when in fact, Mr. Smith stood at her bedside in Honolulu, with an eager parental yearning, which no one is at liberty to disparage, while she struggled through the consummate peril of childbirth.

Smith forget that? It is forgotten in equity, but read Smith's memorial of that Honolulu baby, seven years later, in his last splendid parental letter to the complainant, as well as his previous letters, all found in the record (Rec. pp. 592-98), but unnoticed in the opinion, and need anyone add that the decree of the court is totally misconceived, and sheds no light upon this trial *de novo*?

This complete judicial oversight of all family communication, unrelieved as it is, in the opinion, by the handy correctives of later years, such as Smith's perennial letters, could easily lead to an impression of family

estrangement, where in fact, the family love was perfect and perfectly commendable.

And this unrelieved judicial oversight, would also tend toward a decree for the defendant, while the stubborn facts, as they *are*, can, in *all reasonable judgment*, admit none but a conclusion for the complainant.

Did Smith travel from Minneapolis to Honolulu to give his daughter in childbirth a serpent? And is the trail of the serpent discernible in those last warm lingering *words* of love, from Smith's *pen*, in 1907, any more than in those *acts*, that speak *louder* than words, at Honolulu in 1899-1900?

Let us face the physical facts as they are, and this wicked woman will be inexorably compelled, *not only* to *retract* the family *perjuries*, but to *restore* the family *dues*.

Throughout the equity decisions, the relation of the parties, is the rod that swallows up all the other rods. For in the first place, the parental relation proves the *contract*, in a case like this. It *directly* proves the *substance* and *body* of the contract,—the *execution*. Very little more proof of a contract is needed, in cases of this nature, even as between adults and non-relatives. (129 U. S. 238, 242-43) ; simply another entrance of the same identical doctrine of things "*equitably equivalent*."

In the second place, the parental relation is sufficient *without* a contract, as against a will that does not name the child.

III.

Literally from the hour of her mother's death, Smith

honored the complainant with her mother's *place*, as the *head of his house*, and that place she filled the next two years, and until the defendant arrived. Dr. MacLean had resigned his position partly because he could not get leave of absence, and Mr. Smith set him up in private practice in Minneapolis. But he offended Mr. Smith and Smith told the *defendant's witness Lauderdale* that he said to MacLean:—

“Donald, . . . *you* have got to leave this house. I will buy you a railroad ticket to any place you want to go, it doesn't make any difference where it is.” (Rec. p. 521.)

MacLean had to go and go he did. But what of his wife and child?

The court's version of those facts is this:—

“ . . . trouble arose which resulted in Dr. MacLean's leaving. . . . Plaintiff asserts that her stepfather would not allow her with her child to go with her husband,” but that the defendant's own deponent asserts the complainant's absolute *verification*, the court does not observe. (Rec. p. 101.)

The defendant admits that the complainant was an attractive girl in Smith's estimation. (Rec. p. 469.) In the ensuing two years she was the pride of her adoptive father and the admiration of the neighbors. *Three Minneapolis witnesses, in their depositions for the defendant, make vital admissions. They are Mr. and Mrs. Lauderdale across the street, and Emily Carlson, the household servant.*

Mrs. Lauderdale's attention was called to the end

of this two-year period, the winter of 1901-2. and speaking of that winter she testifies:—

“Mr. Smith was at our house a good deal, because he and Mr. Lauderdale played cards together. He would come up,—he was at our house a great deal, perhaps *three or four times a week*, and in the meantime *we would go down and see Bess and the children.*” (Rec. p. 550.)

Mrs. Lauderdale’s fondness for Bess was not from dearth of amiable neighbors. Such people as Sol Smith Russell and Judge R. D. Russell, with charming families, lived within a stone’s throw.

“*I never knew her other name,*” says Mrs. Lauderdale. (Rec. p. 548.)

Again more particularly as to the earlier years Mrs. Lauderdale testifies:— (Rec. pp. 548-49.)

“Q. His conduct and manner towards her was just like that which you would naturally expect of an own father, was it?

A. Yes.

Q. But as to her manner and conduct toward him?

A. *‘It was just as nice as his was toward her.’*

Mr. Lauderdale testifies: (Rec. pp. 528-29.)

“Q. You had, however, been in the habit of visiting Mr. Smith’s home during the *nearly two years* after the death of Bessie’s mother, and during which time *Bessie was acting as his housekeeper?*

A. Yes, sir.

Q. *And during all of that time Mr. Smith had never made any complaint to you about Bessie's conduct or anything about it?*

A. *No.*

Q. *On the contrary during all of that time he seemed to be fond of her, wasn't he?*

A. *He always was.*

Q. *He treated her really as he would treat his own daughter?*

A. *Yes, sir.*

Q. *And was fond of her children?*

A. *Yes, exceptionally so.*

Q. *And it was only after his marriage to his new wife that this old matter of two or three years before was raked up and made the subject of special conversation with you?*

A. *(No answer.)*

It is stipulated and agreed by and between the parties hereto that the reading and signing, etc..”

No one can wonder that Lauderdale shunned the true answer. That “old matter” was a financial difficulty, imputed by Smith to Dr. MacLean, wherein the complainant's unselfishness, as we shall presently see, was some hundred times more conspicuous than ever the defendant's.

Emily Carlson says:—

“He loved her children.” (Rec. p. 565.)

She was “* * * fond of him and attentive to him.” (Rec. p. 565.)

These are not our witnesses. These are the *defendant's witnesses*. In those two years and former years the deep roots of this case are found, but *all this is unnoticed* in the opinion of the court.

IV.

The court finds that after Mrs. Smith died, "it was arranged," that the complainant was to keep Mr. Smith's house, and MacLean was to practice medicine in Minneapolis. MacLean's departure of course upset that arrangement.

Parent and child are now alone about two years. What did *they* arrange in all that time? The court finds *nothing*. The defendant is *non-committal*. She offers no report or tradition from the lips of Mr. Smith, different from that of the complainant. She makes a troubled effort to show that Smith was a very silent man! But he talked to *others*, and he used his *pen*.

The defendant's denial of her husband's parental *conversation*, is precisely the same strain upon our credulity as her ill-fated denial of his parental *affection*; and her ill-fated denial of the *Hartzell conversations*; her ill-fated denial of her *own mother's sure proof* that Smith's will, number one, was not drawn between the wedding ceremony and the departure of the train (Rec. p. 461-62, 608); her ill-fated denial that any fault of hers waited four days, and until the eve of the funeral, before wiring the complainant in California of her father's death (Rec. pp. 446-450-455); and other astounding denials that we shall presently notice. *Precisely the same strain.*

The *same flat*; the *same contriver*; *all one atrocity*. There was *some* arrangement and whether it was Smith, at some time, told his wife. She says he was honorable. If his story to the defendant in any way differed from that of the complainant, let her tell the court what it was.

Some arrangement was surely made. Seven years before, in the hour of joy, Smith had told the complainant as a child that she was *his*. *Far more important*, in the seven years that followed he had told her the same thing, *by his every act*. And now when they were partners upon the rebound of a double sorrow, he urged her to renounce her husband, and keep his home and cherish him as his daughter while he lived, with the promise that all he had should be hers "when he was gone." (Rec. pp. 195-98.)

If Smith ever told the defendant of any other different arrangement, let her tell the court.

Smith's family love was at *that time* undivided. What the complainant says he then *agreed*, is what we *know* he must have then *intended*. And if his intent and agreement *concurred*, he could not *change* his mind and withhold from the young woman the promised consideration for a stranger, *even if his blood had* become sufficiently cold. He could not *put* two babes out at *sea*, take care of them *awhile* and leave them to their fate for the *lure* of a *childless wife*.

This defendant, a later arrival, was alone with Smith throughout his last *four years*, and she *offers no recital or tradition* from his lips of any *different* arrangement with the complainant than that which the *complainant asserts*.

She would have us believe the intense scenes of those two years were enacted by man and child in pantomime.

“Q. * * * her position in the household was practically the same as her *mother's* position before her death, as the head of his *house*, is that right.

“*That was what Mr. Smith told me,*” says *Emily Carlson*. (Rec. pp. 564-65.)

He talked to his *daughter* before he talked to his *servant*, and the *contract was commensurate with the performance*. It involved the *life and status* of *four people* at least.

For a long while the complainant refused to give up her husband. She was pregnant and wanted to go to her husband for the birth of their second child. But as the time of her deliverance drew near, MacLean was able to show no signs of a home, Smith kept insisting, and finally in April or May, 1901, she consented to the arrangement and a divorce. The child was born in July and the divorce was begun in September, after convalescence. The court comments on the delay, without considering the pregnancy and the childbirth. (Rec. p. 106.)

As Smith traveled to the Hawaiian Islands at the birth of his daughter's first boy, the second boy was *born under his roof*. Smith named him Robert, because his pet name for the mother was “Bob” or “Bobbie.” (Rec. pp. 172, 200.)

Such was Smith's confirmation of his seven years' experience as the complainant's father, and such would

have been the complainant's position to the end of Smith's days, but for fresh events over which she had no control.

V.

All was now tranquil in the Smith home. No forecast now of tears and suffering. But it was the calm before a storm. Forked lightning soon loomed madly in the Western sky. One morning early in 1902 Smith telephoned his daughter that he had an old friend in town, and requested the complainant to come and meet her at lunch. (Rec. p. 203.)

That friend was the defendant. She was at that time a widow without estate or offspring, residing with her mother at Fargo, North Dakota. She was accompanied on this visit to Minneapolis by her brother. Events moved rapidly. Visiting with Mr. Smith *in his house* in Minneapolis one spring evening in 1902, when the *other inmates* of his house were *absent*, according to her own account, the *defendant* consented to become the wife of *Mr. Smith*. (Rec. p. 405.)

Four years later this brilliant and *captivating* woman appeared in Probate Court as his executrix and sole devisee. But like *all* world conquerors she *failed* to make that world conquest, empty handed, without *shifting conditions* of fact and *steady conditions of law*.

The wedding soon followed the engagement. It occurred at Fargo May 16, 1902. Fargo had its uses. The complainant was present at the wedding. She had been present at various functions kindly given by herself in the defendant's honor at her Minneapolis home, but

these courtesies were not returned when business as well as festivity was to occur at Fargo.

On the wedding day Smith made his will, *with the aid of a Fargo attorney*. (Rec. p. 461.) The defendant received a copy; but the complainant received no copy, and that will was *profoundly concealed* from Mr. Smith's daughter until long after the defendant made her answer in this case now at bar. (Rec. pp. 212-15.)

Why the darkness? In that will Smith twice calls the complainant "*my adopted daughter*," bequeaths her \$5000.00, and her *children* \$5000.00, and makes her one of the *trustees* for the children *without bond*. Why was the will a muniment of title unto the wife and a fugitive from the daughter? Why was Smith ashamed of it?

The *defendant* will not tell, and she may not *complain* when those tell who *will*. She denies that she ever *heard* of the Fargo will until *after* the wedding, and she heard of it, then from *someone else before* she heard of it from *Smith*. (Rec. p. 461.)

Stoutly, but nervously, she denies on the witness stand that *her mother*, could possibly have known of this will until after the wedding, but lo and behold, she had *not been informed* that her mother's *testimony then and there resting* in the files, exhibits Smith *defending the inequalities* of this will to *her before* the wedding." (Rec. pp. 608-9.)

What says the complainant? She says the \$10,000 was decidedly *less* than Smith had theretofore *promised her*, the morning after the defendant engaged his hand. He told the complainant of the engagement. He said

no one could ever be like the complainant's mother to him. And he said:—

“Instead of you having everything I have when I am gone you will have one-third, and the boys will have one-third, and Dewey (the defendant) will have one-third.” (Rec. pp.212-13.)

Defendant says Smith was worth \$40,000.00 at that time. (Rec. p. 470.) We think much more. If the complainant had possessed no claim on Smith, he would have been as proud to tell her of the windfall of \$10,000.00 as he was to assure the complainant the rest. There were attorneys in Minneapolis quite competent to draw Smith's will.

VI.

The complainant became a subordinate member of the household. Smith loved the complainant and “he loved her children.” The defendant did not care for the children, (Rec. p. 570), and she did not “like” the complainant. “She did not like her I know that,” says Emily Carlson. (Rec. p. 569.)

“Did the complainant like the defendant?”—counsel asked Emily, and this was her response:—

“She didn't feel at home after she came there.”
(Rec. p. 569.)

Tolerated coldly, where she had lately ruled, she did not feel at home; the torment of homesickness without the relieving hope, that some day she would see the home again. For the fair promise of that hope she had *reluctantly severed* the dearest earthly ties. This high

conflux of events is worthy of notice in a judicial opinion which purports to delineate these family relations; for love is the anti-toxin of disinheritance. Smith's system was too strong to admit that last stage of disease, even in the compulsion and excitement at Fargo.

Smith could not *see* half as straight as Emily Carlson. *He* thought his home was his daughter's home, and complainant begged him in vain for a humble separate maintenance. (Rec. p. 218.) He had taught her no occupation. One day she went to his office and told him she could bear it no longer. There was one thing she could do. She would go on the stage. He objected; did not think her competent, but finally sent her each week she was on the stage the same amount as her salary. The children stayed at home in care of the nurse.

The complainant remained on the stage one season, and then took her children and made a little home for herself and them at Mill Valley, California. There Smith supported her. There she resided from 1903 to 1908. There, with Smith's hearty written consent, in 1905 she married Edward J. Price, (Rec. p. 595), who died without estate in 1914. There Smith made his little colony two visits that suffuse the human heart with joy. There he told W. T. Price, Sr., one of nature's noblemen, at Price's store in May, 1906, after he made his latest will:—

“Bess and the children *are* well provided. * *

* I want to see that the boys have a good education, and means to go into any business that seems best for them to, when the time comes. If I live I

shall see that it is done, and if not they are well provided for." (Rec. pp. 130-31.)

The defendant says this disinheritance is a *mystery*. We say it is *plain*. We say it is not the mysterious duplicity of him who *loved*, but the later duplicity of her who *coveted*. *There can be no fact more certain. No doubt Smith mentioned the care of his family, in some way, in those four last years when he and the defendant were alone in Minneapolis. No one can doubt it, but the defendant says "No." "Never, never, no."*

VII.

Smith made his last will in January, 1906. Attempting to walk up Mount Washington, New Hampshire, with his wife, he died at the half-way house August 16, 1907. The defendant buried him in Minneapolis *five days later*, and *concealed his death* from his daughter in California until the *day of his burial*. (Rec. pp. 225-26, 449-455.)

Crowded for a *reason*, on the witness stand, she and her confederate gave *flatly opposite excuses*; but *just after the event*, when they were *not crowded*, they sent the complainant a letter which *attempted no excuse at all*, for this disgraceful neglect. (Rec. pp. 599, 455-57.)

As soon as she heard of Smith's death the complainant and her husband *hastened to Minneapolis*. They were guests of the defendant a week or two at the *old home*, and *there in answer to the complainant's inquiry*, the defendant in her soft, ingratiating manner, told the complainant, "*she knew the agreement*," the agreement

of Smith and the complainant, as the complainant took her to mean, and would *probate* the *estate* and *send* the complainant her share in *California*, where she advised her again to go. (Rec. pp. 230-31.)

No doubt Smith told the defendant more than once in those last four years when they two were alone, that he wished to carry out his agreement with Bess, and no doubt in order to get the last will as it was, the defendant pledged two-thirds as easily as two cents.

The complainant returned to *California*, but she waited and heard nothing from the defendant. She wrote her repeatedly in vain, and finally, convinced of the defendant's treachery, she made a *second* pilgrimage to *Minneapolis*, the next year, and sued the defendant upon her claim.

A demurrer to her complaint was sustained, but whether upon the merits or upon some of the three specified grounds in *abatement*, does not appear. (Rec. pp. 69, 70, 71, 90.) It was a case of *uncertainty*, and *no bar*. It was an uncertainty upon which the court below did not stand and rely. No final judgment was ever entered in that suit, (Rec. pp. 70, 71, 90), and no ground of general demurrer is *imaginable* in *Minnesota* where such claims have repeatedly prevailed upon like pleading. (Cases cited below) An appeal was begun and dismissed. It is clear the complainant never had her day in court, upon the merits, but this is set up here as a defense.

The defendant removed to *Oregon* soon after that proceeding, the complainant remaining in *Minneapolis*

until 1914. Needless to recount the years of poverty and distress. Complainant has never had the sinews of war. She has found the utmost difficulty in providing the expense of this suit.

But against all odds she has brought up the boys, two fine young fellows, well abreast of their school work, lately finishing the grades. Shortly after the present suit was begun she joined her old father Ailes at his request on a ranch in Washington. There as the sole female inhabitant of his cabin she had the new experience of braving the hardships of pioneer life. Ailes finally lost possession of the land and the complainant then returned to Mill Valley on San Francisco Bay, where some of the quieter years of her life had been spent.

ASSIGNMENT OF ERRORS.

Complainant assigns the following errors, to-wit:

I.

The court erred in its judgment and decree wherein and whereby the court ordered adjudged and decreed that the bill of complainant herein be dismissed.

II.

The court erred in denying the complainant the relief for which she prayed in her bill of complaint.

III.

The court erred in rejecting the complainant's offer in evidence of the certain letter of C. A. Brown to the

complainant, marked as Complainant's Exhibit "I", which letter is in words and terms as follows:

Minneapolis, Minn.,

June 26, 1909.

Mrs. Elizabeth S. Price,
1200 Second Avenue South,
City.

Dear Madam:

Mr. Dunwoody has turned over to me your letter to him of June 24th for the reason that this being his last day in Minneapolis his time is exceedingly crowded and he cannot find the opportunity to reply in person. He has, however, talked with me quite fully concerning the contents of your letter and has outlined his ideas in regard to your affairs, so that I feel warranted in saying that this letter expresses his sentiments as fully as my own.

I have not seen Mr. Hartzell since his return, but am not surprised at the position he takes in regard to the uselessness of conferring with your attorneys. Our position in regard to that is precisely the same. We would have no confidence whatever in any predictions made in regard to the outcome of the case by an attorney who will take a case on a contingent fee, and we can see no object in talking with them about the matter, because we feel absolutely certain that Mrs. Smith can neither be cajoled or threatened into making any settlement of this suit. We feel certain that by your course in trying to break the will of Mr. Smith you have put yourself beyond the pale of her sympathies, and that the only hope of ac-

completing anything in an appeal to her lies in reaching her sense of justice concerning the education and maintenance of your boys, in regard to which I understand she has acknowledged several times that Mr. Smith intended some provisions should be made for them and relied upon her to carry out his wishes. We believe her position is that your course has made it impossible for her thus far to do anything along this line and that nothing of this kind could be done until this lawsuit was finally disposed of. In any event we do not anticipate that she would be willing to pay over a lump sum of money to be handled by you or your attorneys.

We should suppose that if she can be persuaded to do anything it would be something along the line of placing your boys in a good school where they would be well taken care of and where the necessity of their education, which is becoming urgent, would be fully met. Of course we have no means of knowing whether she would even do this, but we should be greatly disappointed if she refused to do anything of this kind. It would not be surprising, however, if she made it a condition that these legal proceedings should be discontinued before undertaking the education of your boys.

It is our opinion that if such an arrangement could be brought about it would be altogether the best thing possible for the future of your sons, and that, of course, is dearer to you as a mother than anything else on earth. Furthermore, it would leave you unhampered to earn your own living, which you have thus far not been able to do, presumably because you were so tied down by the care of your children that you could not give

up your entire time to any employment. We can conceive of no other reason why a woman in the prime of life and in reasonably good health and with the advantage of an appeal to the sympathies of people, and with friends to speak a good word for her, could not within a reasonable length of time secure employment, by means of which she could, with strict economy, maintain herself in a fair degree of comfort. Innumerable women have to do this, and do it successfully even when they have no friends to fall back upon in case of emergency, as you have thus far had.

Your truly,

C. A. BROWN.

IV.

The court erred in rejecting the complainant's offer in evidence of the authenticated copy of the inventory of the estate of Peter B. Smith, verified by the defendant herein, which inventory was so offered by the complainant as complainant's Exhibit "G," and marked and designated as such.

ARGUMENT.

C. A. Brown, of Minneapolis, gave a deposition for the defendant, as a witness of Smith's will. About a year after Smith's death, Mr. Brown as the defendant's apologist, and apparently in the defendant's behalf, wrote the complainant a heartless letter, such as *Smith* never wrote, in which, however, he admitted as follows:—

"I understand she has acknowledged several times that Mr. Smith *intended some provision*

should be made for them (the children,) and *relied upon her* to carry out his wishes * * * we should be *greatly disappointed* if she refused to do anything of this kind." (Rec. pp. 604-7.)

All can see that C. A. Brown in 1909 was not dispensing fiction for this complainant. His letter was excluded, but on every principle which admitted the letter of Ed. J. Price to Jessie Carey Smith, (Rec. pp. 417-19, 604), and perhaps on the authority of *Burns v. Smith* 21 Mont. 251, 75; 53 Pac. 742, 48, it was *res gestae*. It was *res gestae* partly because it is a contemporaneous writing which furnishes to a moral certainty the clue of this case. But exclude it for a moment if you will.

Wilbur Hartzell, now a fruit-grower of Medford, Oregon, and for twenty-seven years prominent in the Van Dusen-Harrington Company of Minneapolis, testified at the trial, that the defendant said to him, when he expressed surprise at the will:—

"Why, Mr. Hartzell, I think that is one of the finest things P. B. ever did. *He left it all to my honor*, to take care of those boys, and *I propose to do it*, and see that they have good schooling. But I can't do anything for Bess now." (Rec. p. 136.)

Just after Bess had sued her, according to defendant's dates. (Rec. pp. 439-40.)

Mrs. Hartzell, a cousin of the complainant, testified at the trial that soon after Mr. Smith's death the defendant said to her:—

"* * * that she understood what P. B.

wished, and she *intended to carry out his wishes*, regarding the boys." (Rec. p. 154.)

What has the defendant to say for herself? She sits on the witness stand and after much sparring and delay finally repudiates these conversations, in succession. These witnesses have delivered malicious inventions of perjury if the defendant's denials are true, and no one has ever charged this infamy.

The truth of this matter is easily apparent from the defendant's total plan and scope. She denies these conversations with the witnesses, and she denies the remotest conversation with her husband on the subject to which those conversations with the witnesses relate. She sweeps away their whole foundation. She never even heard of any will, in Smith's lifetime, save the Fargo will. She learned of the later will, never from Smith himself, but from others after Smith died.

Not a suggestion in regard to Bess and the boys, did Smith utter to her, touching their care and welfare, from 1903, when they left the old home, to 1907, when he died.

"Mention of money matter, in reference to them.

A. *No, indeed.*

Q. Ever mention to you his *ideas* concerning them and their prospects after he died?

A. *Never, never, no.*" (Rec. p. 452.)

All *admit* that in the period in question, Smith assisted the complainant in building a home in Mill Valley, and sent her cheerful remittances from month to month

and year to year. His letters show this. But not a word did he speak. He talked and wrote to outsiders, but never a word to his wife. She says he was the soul of honor. Never a word in his last four years about the care and fate of the only child he ever called his own; the child interchangeably designated by himself in the defendant's own documents here, as "daughter," and "my adopted daughter."

The defendant has already testified that she supposed the Fargo will stood in force until after Smith died, and knowing that in this will he repeatedly called the complainant, "my adopted daughter," and made her a trustee of \$5000.00 without bond, the defendant dare not deny, and does not deny, what the whole case shows to be true, that the term, "adopted daughter" defined the complainant's status in the decedent's mind to the hour of his death.

Not a word from Smith for the good of his only daughter; nor for the good of her babies whom he had rendered fatherless; never a word for weal or woe of the tender family whom he told the defendant's witness Lauderdale just how he had beheaded and seized.

But her defiance of these four witnesses is only begun.

"When they went away we spoke of them very often in a *casual manner*," says the defendant, on her oath, to the trial court. (Rec. p. 451.)

"The children are *very dear to me*, and it will make a *big void in my heart* to have them go," wrote Smith in a letter *just before that time*. (Rec. p. 592.)

The defendant knows as everyone knows that *love* is the *secret* of *parental dispositions*, and that *loss* of love must *precede disownment* and *disinheritance*. As for *herself* the defendant says, *she* "always had a tender feeling toward the boys," which remained unabated until after Smith died. (Rec. p. 438.) But with *Smith* it was *different*. "He was very fond of the boys when they were *babies*, but as they grew *older*, and he saw them but *twice*, he seemed to drift away more from them, and he spoke less of them from year to year." (Rec. p. 454.)

As to when he last ever so much as mentioned them at all, she says:—

"I think it was probably after our last visit to see them after the earthquake." (Rec. p. 454.)

The earthquake was in April, 1906, and Smith lived until August, 1907; a year and four months. These are sad revelations. So far forgot his family that they were no longer a tradition at his fireside. It is pitiful in court to see a woman compelled on oath to class her dead husband and benefactor as a man, unstable as water, as heartless as a snake, and as cruel as the grave; and thereupon a providential *letter* of the defendant's *own* agent *Jessie Carey Smith*, compelled the defendant to face clear about in the court room; compelled her to *confess*, as she actually *did then* and *there confess* that down to the night before Smith died, when he drank a toast in their honor, he spoke very freely and lovingly of both the boys, and "*was very fond of them and very proud of them too.*"

A valid defense out of such turpitude? This case is

a *confession*. It is more than a *default*. Suppose we had not possessed this letter to stem the reeking tide of maternal corruption. Atrocious denial, documentary impeachment, and abject confession. Such is the defense. Such the answers to these four witnesses. We shall see by and by that defendant has actually eight more witnesses yet to answer. For the present she stands slandering the family love, honor and constancy of the man she had sworn to love, honor and obey, and all this for the one sinister end and aim of clutching to herself, from his defenseless family, the last shining penny of the dead man's estate.

Can she gather grapes from these thorns? Falsehood? Meanness? Impudence? Did the like of it ever parade before the eyes of a court of justice? It is enough to make the blood boil wherever red blood flows in human veins. This defendant *ought* to lose the uttermost farthing.

We do not need a contemporaneous letter that shall compel her to say in so many words, she will burn her whole house. There is her foundation, shattered by her own hand; gone like the House of Usher.

Smith talking and writing to *others*, but never a word to his *wife* in *four years*, *pro or con*. There *needs* no letter from the grave to refute *that*. There *needs* no letter to show beyond *all doubt* that these witnesses tell the truth, and that this defendant's unstable denials are *false*. Her case is in the *quicksand*, not in the solid *truth*.

There is only *this* question:—Which impeaches the

defendant with most violence; the several *witnesses*, or the face of her *story*, or the impeaching *letter*, or the grovelling *retraction*, or the honor and decency which found lodgment in Smith's constitution; or the honor and decency which statutes and equity *presume* found lodgment there, or the interlacing system of Smith's *written* and oral *declarations*. The defense is *broken up and destroyed*, leaving the complainant not only a clear *default* but a clear *verification*.

Four direct *witnesses*, that the defendant confessed and admitted the trust laid upon her by Mr. Smith; two men and two women, *C. A. Brown, Wilbur Hartzell, Mrs. Hartzell* and the *complainant*. On this point the court in the opinion quotes the two women, overlooks the two men and declares the testimony "*upon the whole*" *insufficient*. The court *overlooks* numerous impeaching *letters*, and numerous impeaching *witnesses*; *overlooks* the complainant's correlative *support* found in *letters, declarations, witnesses, and presumptions*, and declares the complainant's evidence, "*upon the whole,*" *insufficient*. The court says the testimony must be "*irrefragable*." It is irrefragable, although this is certainly not the rule of evidence, either in Oregon, where "the preponderance of the evidence," ruled the similar case of *Kelley v. Devin*, 65 Or. 217-18; 132 Pac. 535, 537; and where as late as *Coe v. Coe*, 75 Or. 145-158; 145 Pac. 674-678, it was held upon the question of a constructive trust, that the words "free from doubt," do not express the degree of proof required in civil cases; nor in *Minnesota*, where the language "clearly and satisfactorily established," is employed as the rule by the Supreme

Court in the late case of *Robertson v. Corcoran*, on this subject, 125 Minn. 118, 121; 145 N. W. 812, 813; to say nothing of the law in Oregon and elsewhere that oral arrangements collateral to a will and constituting good family settlements are "favored in equity." (*Kelley v. Devin*, page 218, *supra*, and other cases cited below.)

Especially is this so when the courts remark, as courts frequently *do* remark, that there is *no other child*, or *no child of the blood*, none but the one of virtual, substantial, practical adoption. (Cases cited below.)

Some fiduciary delinquency is here *beyond all doubt*. Something was committed to the defendant in sacred trust, which she now ignominiously denies and withholds. *The next question is how much?* On that the defendant makes *wicked default*. She will *not tell*. By no standard of law or decency can she be heard to murmur when *those tell who will*. *The utmost good faith is required of her*. *A deliberate confuser of goods* must prove or lose his own share; emphatically so when that confuser is a treacherous fiduciary.

If this well-provided defendant, from mere excess of greed, has plucked one apple from the sacred tree of these destitute people, then as there is a God in heaven and a court of equity upon earth, by the sweat of her brow for the rest of her life she ought to earn her bread. She comes off TOO WELL in point of law and mildness if she saves the one-third conceded to her by the complainant.

The *defendant* it is who, in this situation, must *prove* the *basis of division*. She it is who has done all the mis-

chief, and caused all the misery. She it is who is put to this proof. (Cases cited below.) If this faithless trustee perversely refuses to disclose her own true portion, it is far better that *she* should lose her share than that *those whom she cheats* should lose *theirs*. That is *self-evident*. These facts are *sure* and these laws are *elementary*. This case is *clear*. This case is *phenomenal*. But in the victory of this stupendous wrong these good laws have suffered *disregard*. The contention that is right in morals should prevail in equity unless some obstruction is *insurmountable*. Injustice and falsehood *combined* are *not* insurmountable. There *is* no obstruction. From New York to California, the courts early and late have dispelled the error of calling any such suit an oral attack upon a will. They hold the will must stand, but the collateral disposition must be enforced. (Estate of O'Hara, 95 N. Y. 403, 413-14; 47 Am. R. 53; Curdy v. Berton, 79 Cal. 421, 426; 21 Pac. 858, 859; and other cases cited in brief below.)

The will is not the issue, and it is not insurmountable. The will stands aside as a spectator, while oral arrangements for family protection stand in equitable *favor*. (65 Or. 211, *supra*.) Child robbery is merciless, and truth is merciless when it overtakes that infamy. The *way has been opened* here for *equity* to do *justice*. The way of all such transgressors *should* be *hard*; such transgressors who cause great disappointment *even to friends* like C. A. Brown.

Whenever a testamentary disposition is alleged, the shocking injustice of the defense is always a strong, independent factor of evidence for the complaint. It is

not enough alone, but it goes far. Said the Supreme Court of Minnesota by Ch. J. Brown as late as *June 18, 1915*:

“Without some *explanation* the purpose to ignore his immediate relatives would seem strange and *unaccountable*,” and in that instance the explanation was satisfactorily proved.

Woodville v. Morrill, 130 Minn. 92, 97; 153 N. W. 131, 132.

But there the relatives were only *collateral*. We shall invoke a presumption more specific. Explanation of the unaccountable, is surely demanded of this defendant, and explanation is by her expressly *disclaimed*:

“No, *I cannot account for it*,” says the defendant. “It was as much a surprise to me as it was to anyone.” (Rec. p. 460.)

But when great wrongs seek perpetual shelter in equity, *surprises* will not *stand* in lieu of *proof*. And as this lady now of the name of *Wallace* brandishes the *sharp edged knife of poverty* over the family whom Mr. Smith in his lifetime always *did* protect, let her look well to it that her legal scale do not vary *in the estimation of a hair*. *Smith protected* his family while he lived, and he *said* he had protected their future. When directly questioned the defendant is *wise* to forego explanation. She knows there *is* no explanation, that will not explode by the prick of a pin, and *it is fruitless for the court to attempt explanation* (Rec. p. 113) where the *defendant* has *none* she *dare assign*.

Smith insured his wife over and above the estate

(Rec. pp. 179-80) and like too many others in the books, he *thought* he had insured his family. (Cases cited below.) The destitution of this family is the act of one impelled by *greed*; not the act of one who had no motive but *love*. Doubt this, however, if you can. Doubt if you can that Smith ever in *all the years* made a *promise*, an *instruction* or a *suggestion* in relation to his own. Say, *if you can*, that this doubt is *reasonable*. It profits the defendant nothing. On the defendant's own admissions from the witness stand, first that the complainant was Smith's *daughter*, and consequently next that the will is *hopelessly astonishing*, the case then calls *loudly* for the application of the following law laid down in Missouri, supported on principle in Minnesota, and questioned no where yet in courts of equity:

“ . . . since she was forgotten in her adoptive father's will, she must be accorded the rights given by law to a pretermitted heir.”

Thomas v. Maloney, 142 Mo. App. 193, 198; 126 S. W. 522, 524.

We cite the following statutes for the benefit of pretermitted heirs:

Minnesota Revised Laws 1905, Secs. 3669, 3653, 3648, giving the child two-thirds.

General Statutes of Minnesota, 1913, Secs. 7260, 7243 and 7238.

Bellinger and Cotton's Annotated Codes and Statutes of Oregon, Sec. 5554.

Lord's Oregon Laws, Sec. 7325.

Still broader in effect is the following from the Supreme Court of Minnesota in 1913:

“Neither can it be said . . . that because a court *cannot* decree the *status* of adoption, it may not adjudge *property rights equitably equivalent* to those *legally incident* thereto.”

Fiske v. Lawton, 124 Minn. 85, 92; 144 N. W. 455, 458.

Such is the law of the land on which these transactions occurred. In the Missouri case there was an ancient oral agreement to adopt, but no statutory adoption, and no contract or provision as to property whatsoever. It was an admitted case of parental neglect, yet the child won her share.

If the will was not evidence against a *presumption* of *oversight* there, it is not evidence against *proof* of a *contract* or *provision* here. All the *body* and *substance* of *that decision* is found in the *case at bar*. For both cases rest on the *same foundation of adamant*.

A will which fails to name an only child of fourteen years' virtual, substantial adoption; which fails to present even the significant one dollar, is not better evidence here than elsewhere that the parent has transformed himself into a beast; thrown family to the wind; thrown education to the wind; thrown promises to the wind, and thrown the eternity that faced him to the wind. The mere will is not evidence of it.

By analogy to the humane presumption of law, there is a general presumption in equity always, and a special presumption on the facts at bar, of parental solicitude

and honesty; a presumption that *nothing but evidence will rebut*. And when the defendant dismisses this matter as a *riddle*, she leaves that presumption *standing intact*. *This mighty wrong must fail, therefore, on the defendant's own elucidation*. Equity is no more eager than the law to sit with hands tied while it signs the death warrant of right and justice. Such a *will is not evidence* that Smith first appropriated and then shamelessly offended against these little ones. The material is right here, that long ago founded decrees human and divine.

We defy counsel to show where a court of equity has ever yet declared this Missouri case bad law. The enlightened and natural position there taken is merely abreast of the statutes. It is a position when once taken in equity, from which equity can thereafter scarcely recede.

All legal roads lead to justice. Justice is their origin and master. Legal roads are not mere conductors to the shades of obliquity. They lead to the plain truth. The destitution of this family is the act of her who evermore withholds, not of him who evermore provided.

If respected, these laws are of course conclusive of the case at bar. Why should these several laws be laid away? What unsoundness is there in them? What evil have they done? Why should equity shrink from their execution? Why will equity abjure the instruments of its profession? These laws and these courts are all that stand between the people and a never-ending succession of corruption and swindle.

Yes, all the substance of the Missouri decision, all the substance of the Minnesota decision is here, and these cases are in harmony with the large body of American law on this subject.

The case of *Daniels vs. Wagner*, 237 U. S. 547, differs from the case at bar in its facts, but not in its equitable substance. Maladministration was clear, and nothing urged by the delinquent fiduciary, was allowed to obstruct his condemnation, as a trustee *ex maleficio*.

According to the *defendant's witness*, Mrs. Lauderdale, the complainant's conduct toward Mr. Smith, "was just as nice as his was toward her," (Rec., f. 549) and his conduct toward her, "was just like that which you would naturally expect of an own father." (Rec., p. 548) That then is the *confessed* relation of Mr. Smith and Bess in 1901. They were companions in a double sorrow. It was before the era of the defendant. Smith's family affection was undivided. The complainant and the babies were his home. That home was sweet according to the time-honored servant in Smith's house, Emily Carlson. And Smith himself in one of his letters to the complainant praises Emily Carlson. (Rec. p. 597) What the complainant says Mr. Smith then promised we know he must have then intended. He could not change his mind for a new attraction, if his blood ever became sufficiently cold. He could not put two babes out at sea, take care of them for a while, and abandon them to their fate for the lure of a childless wife. If his soul died, his contract survived. But come down to his last days. Here were two females. They were the only two. Smith supported them both. He loved

them both and he remembered them both. Smith never did take this complainant as a poor girl, without choice of hers, lead her up the delectable heights of luxury, and then without warning and unaccountably, dash her to the cold ground, at the moment and coincidence of his death, when he knew that money would be of no more use to him and when he knew he could no longer answer a cry of distress.

It can be said of this complainant's agreement, as it was said of the similar oral agreement in the Supreme Court of Oregon in 1913:

"It was a natural agreement, in the nature of a family settlement, and it should be carried out by the courts if possible, because such agreements are *favored in equity*." *Kelley v. Devin*, 65 Oregon, 211 *supra*.

The defendant swears she permitted Smith to act naturally. She is bound by that oath. This disinheritance is the natural child of greed, not the unaccountable miscarriage of love. The legal presumption of Smith's parental care is signally vindicated by the evidence. Presumption and witnesses concur. Mercy and truth are met together. These twin peaks of the case are conspicuous enough, but above and beyond all, standing between and supported by them is the summit: When the complainant gives the only version of the disposal and division of this estate that is consistent with Smith's manhood, fidelity or honor, and the defendant with full knowledge of the facts, gives a version which we know is replete with falsehood and injustice, when she meets

the issue by nothing better than conjugal smirch, and enforced retraction, then if this sublime mixture of evil is entitled to an award of equitable triumph, it is impossible to repress the inquiry when will high courts of conscience expel the intrusions of infamy.

Holding that the testimony must be irrefragable, the court suggested certain doubts. We have seen that this degree of proof is error, in civil cases, and now let us look at the doubts.

(1) The court remarks that the complainant did not present her claim in Probate Court. The error of this is *severe*. She acted both on *Minnesota authority* and the advice of *counsel*. The authorities then existing and cited below are *unanimous* that *Probate Courts* have *no jurisdiction* of these *constructive trusts*, and if conformable to the pleasure of the court, on trial *de novo*, we crave leave to *present and prove* a *letter* of the complainant's *counsel*, *Henry E. Barnes, Jr.*, dated *September 23, 1907*, a month after Smith died, in which upon an examination of the authorities, she was *in effect so advised*. The authorities examined no doubt included *Laird v. Vila*, 93 Minn. 45, 100 N. W. 656, decided three years before that time.

(2) The complainant finally accepted Smith's offer late in the Spring of 1901, but the divorce was not filed until September. The complainant was pregnant at the time with her second child Robert, born in July. The divorce was begun soon after convalescence. The court quotes at length from the complainant's testimony and comments on the delay, but overlooks her brief re-

mark that she was pregnant. These errors are prejudicial. We defy counsel to point out where the complainant has erred in a whole day's examination on any material matter.

(3) The complainant showed in court that Smith early desired her legal adoption. This was in keeping with his whole attitude. The complainant admitted on the stand that she once answered Jessie Carey Smith that her mother thought best to forego a legal adoption because her divorced father had the prospect of a gold mine in Alaska. That episode occurred about seven years before Smith died; long before he designated the complainant as his daughter and trustee in his solemn will, and long before a myriad of parental offices to the end of his days. It was no check whatever on the parental activity of the man whose parental and disposing mind we are considering.

The girl who would not deny that two-party conversation on the witness stand, was beloved by Smith as a daughter. The defendant says he considered her an attractive person. That attraction was grounded upon such traits as love of children and adherence to truth. There was a mental part in this Mr. Smith. We read it in all the witnesses and all the letters. It was severely bartered at Fargo, North Dakota, in the year 1902, but the tendency of good constitutions is toward recovery. Instead of presuming man's infirmity, if we read the witnesses and letters in every line, it becomes impossible to believe that Smith on any consideration ever bartered his soul.

But if we are to insist upon his total depravity; if

murky atmosphere is to surround his tomb, his family promise made before the day of his obsession is unimpaired. The real mother before King Solomon won her famous case on that well nigh infallible presumption, of all codes and all generations that one who really does stand in the parental relation will have the honor and innocence not to abandon the child to a cruel fate. The same presumption is sufficient here without an army of supporting witnesses and documents. And the same presumption is the actual secret of the child's success in the great body of American decisions upon this subject, will or no will, contract or no contract, wherever the substance of the parental relation is found.

But the court inadvertently removes that remark of the complainant about the gold mine some seven years from its setting, and quotes it where it might easily be mistaken for a LAMENT of the complainant, "after the estate was probated." This displacement may have been prejudicial. (Rec. pp. 112, 390, 391, 333.)

(4) Referring to Smith's alleged parental agreement, followed by the wedding day will, the court says: "Considering Smith's sense of honor and his faithfulness in observing his obligations, it seems hardly probable that he would have made such a will in disregard of such an agreement." The argument is self-destructive.

The complainant's whole version of this case is a thousand times less reproach to Smith's honor, than the defendant's whole version and the court's whole version,—especially in view of his conceded interference which led to the divorce and the orphanage.

Hardly probable. Standing on a pinnacle alone, the fact would be hardly probable; but standing underneath its related facts, it is hardly dispensible. What else can explain the defendant's absolute impeachment by her mother, when she vainly attempted to hide all knowledge of that fugitive will? What else can explain the execution of this will before a strange attorney in a strange land? What else can explain the defendant's pretense that without her knowledge Smith went to an attorney and made the will between the wedding vows and the departure of the train? It was a clear case of no will, no I will. Fine modulation and quiet insistence could dampen a wedding better than any Rime of An Ancient Mariner. What else can explain the lady's protest that she does not know when she even looked at the copy thereof, carefully furnished her by Mr. Smith for preservation, before she stirred out of her Fargo. The defendant is most innocently impeached by her mother. She is not false in one of these things. She is false in all of these things.

All along her route is the trail of the defendant's impeachment. She is mercilessly impeached by the letter of Mr. Smith which flatly refutes her wicked oath of Smith's casual family acquaintance. She is mercilessly impeached by the letter of her witness Jessie Carey Smith, flatly refuting the defendant's slander of her husband's family honor; by the letter of her own witness C. A. Brown, showing her former admission how Smith in this business trusted and relied upon her; by the sworn statement of her own mother which flatly refutes her pretended innocence of the Fargo will; by the deposition of

her witness Mrs. Wright, which discredits her alleged copy of Smith's letter; by the depositions of her witnesses Mrs. Lauderdale, Mr. Landerdale and Emily Carlson, when she says Smith never uttered a care of his family in his last four years; seven witnesses of her own and the decedent actually veer to the complainant's side. She is impeached by the testimony of Mr. Hartzell and Mrs. Hartzell, which prove the same confessions of trust as the letter of C. A. Brown; by the testimony of W. T. Price, Sr., who recites Smith's account, after his last will, of the provision already made for Bess and the boys; and by the testimony of the boy Donald, who recites his own early recollection of Smith's love. Twelve witnesses, besides the complainant, and this is not a catalogue. These are samples. No mere error of date or circumstance. All fiendish, blazing, malignant.

If this defendant had a true defense she would never in the world waste *all* her time on a false one.

(5) In view of the defendant's own virtual acknowledgment of the complainant as a daughter and trustee of Mr. Smith to the end of his life, and in view of the fact that babies cannot be *particeps criminis* in desperate financial efforts of the mother in behalf of the unhappy father, all the defendant's contradictory account earlier in the trial of trouble between Smith and the complainant in money matters, beginning when the defendant began and ending four or five years before Smith died, and attributed by Smith to the complainant's husband according to Mr. Lauderdale, all this is unseemly and irrelevant gratuity.

We have seen that the defendant's three witnesses,

Mr. and Mrs. Lauderdale and Emily Carlson, in their deposition on cross examination freely declare the unruffled steadiness, the full substance and the mutual character of this parental and filial relation *at least down to the day of the defendant, at least until after this family contract was made.* The testimony of these three witnesses of her own will no more mix with the testimony of the defendant as a whole, than oil with water.

The court relies for the relations of these parties down to 1907, not upon this general testimony of even the defendant's witnesses, but upon two alleged expressions of 1902 or 1903, one on the word of this defendant, and the other on the memory of Mr. and Mrs. Lauderdale. This latter is a truly Herodian outburst said by these *same* defensive witnesses to have been made by Smith, at the defendant's tea table, and the defendant's elbow, one Sunday evening in the complainant's absence, in 1902 or 1903. It was to the effect that he was absolutely going to do no more for Bess and the babies. He was going to renounce his family. *He was going to "absolutely stop."* *But in the next five years he never stopped.* Parents have been known to recover in five years from an outburst of anger, *fomented or unfomented.* Are we to suppose the strength of the tea overwhelmed all that could subsequently happen forever?

The other quotation is a copy that the defendant claims to have made in her own hand, under suspicious circumstances, of a letter of Peter B. Smith. The part quoted by the court criticizes the complainant in money matters. It is contrary to the best recollection of the defendant's witness Mrs. Wright, who saw the original let-

ter, and it is so different from Smith's letters in the ensuing years, which all admit are authentic, that its validity is severely shaken, and in all events its import is entirely superseded and obliterated. The court calls it Smith's letter. The parental relation is indeed the secret of the case, and if that relation is to turn on *Smith's letters*, let us look to the letters that we *know are* Smith's, not to the *defendant's ink*, which differs from *all of* Smith's ink as the dead of midnight from the noonday sun.

If we wish to discover Smith's relation in 1907, let us take what *he wrote in 1907*, not what the *defendant* wrote in 1903. This case seems too plain for argument. *Not an unkind word were they able to find on earth concerning the complainant over the signature of Peter B. Smith.* Out of the heart are the issues of this case, and there is certainly a heart in Smith's fatherly letters that is not in this judicial opinion.

(6) The remark of the court that after a certain date, Smith's allowances to his family ceased, is also very unfortunate, in view of the fact that all Smith's letters down to the last one to be found, a few months before his death, show that his kindly, fitting and ample remittances *never* ceased, and better still that his triple remittances of *parental thought, never, never ceased.*

The court must fail just as completely as we have seen the defendant fail, in any attempt to impeach the constancy of Smith's parental manhood.

(7) One witness adheres to the defendant, Jessie Carey Smith. She is the lady who traveled to Portland from Minneapolis to show the court that she knew what

Smith thought better than Smith himself. *Smith* may call the complainant his *daughter* to his heart's *content*, and *write* her as such unto the *end*. The *defendant* may *concede*, if she *must* concede, Smith's constancy unto *death* in that regard. But after evading the question as long as she *could*, Jessie Carey Smith declared to the court on her oath that the complainant was *only a friend*. (Rec. pp. 367-68.)

At 1 P. M., August 16th, in New Hampshire, Mr. Smith died (Rec. p. 600). Confessedly *some* way was found to get the news into the *pine woods* of *northern Minnesota* that *same afternoon* (Rec. pp. 398, 394-395), but no message could penetrate the wilderness of San Francisco Bay for a space of five days from the coincidence of Smith's *death* to the co-incidence of his *funeral*. San Francisco shineth in darkness and the darkness comprehended it not. *Defendant* *hated the very thought* of this claimant-daughter. Telegraph strike! Jessie Carey Smith insolently tells the court concerning the complainant's telegram:

"*I was notifying the friends* in Dewey's name so I suppose,—I think I sent it." (Rec. p. 372.)

Asked whether the telegraph strike made any delay she still more insolently answers:

"*Well, I don't know that it did. Did I say that yesterday? I don't remember.*" (Rec. p. 373.)

"*I don't know anything about it.*" (Rec. p. 374.)

(Rec. p. 375.) "You have taken a good deal

of interest in this case, haven't you? A. Yes, I am interested in it; *know all about it.*

The price of a soul.

A few minutes later Jessie Carey Smith is caught saying that on one occasion she asked the complainant *whether Mr. Smith had ever adopted her.* She thinks Smith adopted all his *friends* as his *children.*

The defendant sees this will not do. *She follows* Mrs. Smith on the witness stand and says a *telegraph strike caused the delay.* *Mrs. Smith* had at *first* taken refuge behind the *telegraph strike*, but abandoned that position. (Rec. pp. 370-74.) THEREUPON A LONG LETTER WRITTEN JUST AFTER THE FUNERAL BY JESSIE CAREY SMITH to the complainant on behalf of the defendant, and *affecting great kindness and consideration*, shows NEVER A MENTION of the TELEGRAPH STRIKE. (Rec. p. 599.) Any one would have hastened to explain the painful delay if the cause had not been disgraceful. No strike in that letter but the strike of the fiduciary. *Yet out of all this confusion the court says: "I think the explanation of the delay is very clear."* (Rec. p. 450.) That letter went several thousand miles out of the way of all humanity, despite all its protestations, to inform the young woman just at that time that her relation to her dead father was that of a "*dear friend.*"

The complainant did not think of it that way. She went to Minneapolis at once; she and her husband; not to *learn* whether she had rights, but because she *knew*

she had rights. Any one in Minneapolis could have told her whether she was a legatee in the will. She and her husband very well knew that. She did not travel to Minneapolis from California for mere love of the defendant, but soon after she reached Minneapolis she told Jessie Carey Smith, according to Jessie Carey Smith, that she did not expect P. B. to leave her anything, but thought he might have remembered the children. On the other hand, this neglect of the complainant, so fully expected by the complainant, is to this day a dark, unsolvable mystery to the defendant!

Crime waited until this case for its masterpiece. This case is a horror. It is the very refinement and quintessence of evil.

When the complainant gives the only version of the disposal and division of this estate, consistent with Smith's manhood, fidelity, or honor, and the defendant with full knowledge of the facts, meets the issue with a demoniac mixture of slanders, confessions, contradictions, cruelties, and perjuries, then, indeed, if her defense prevails, it becomes impossible to repress the inquiry, when will "hell-broth" stir the revolt of equity.

AUTHORITIES.

I.

Flexible and penetrating are the legal theories, but they all converge on the one object of bruising the serpentine head of fraud.

Pathetic as the facts in this case are, they assume a deeper color in the light of kindred citations. In no

other branch of judicial literature is the humane feature more eloquent and controlling. Unless some innocent party is damaged, the child in such cases seldom fails to receive, the usual child's share. No one can read the decisions without seeing that they are grounded, four square, upon the plain distinction of right and wrong. As to the legal terms employed, their name is legion, but the whole creation of God has neither nook nor corner where the perpetrator can bestow his fraud and say, it is safe.

I suspect no one would say the total absorption for which the defendant contends is *right*. And so exhaustive are the equity decisions, that on the admitted facts, and the settled law, there is no *room* for success in this case at bar, of the side that prays for a *wrong*.

One illustration will suffice: After he once willed the family \$10,000.00 and again wrote that he would provide suitably for education, and took the custody of the babes from their father, and told the defendant's mother he had provided well for his daughter, and fully *sustains* this same parental frame of mind, in his unbroken line of remittances, visits, and letters, to the very last, *then*, to say nothing of his extended oral commitments, but *building entirely* upon the *documents* and the *defensive admissions*, there is no admissable *reason* to *withhold* the rule of evidence, that the defendant is at least called upon to *offset* these facts, by something *said* by Mr. Smith *later*, to the *contrary*, instead of falling back as she does on the proposition, that in four years, he said never a word *pro* or *con*.

What is the nature of the legal remedy for this wrong? By what sign and token is it discernible in the decisions? Is it chiefly by the stipulation of a moment, or the course and destiny of a life? The right of the child which is protected and enforced in such cases is by no means a mere contract right. It is rather the right to redress against fraud. The measure of recovery, if there be no other measure, is found in the *statutory*, "child's share," of the estate.

The parol evidence is "*auxiliary* to the proof afforded by the *circumstances of the case itself*."

Waterman's Spec. Perf. 261.

Harrison v. Harrison, 80 Neb. 103-110; 113 N. W. 1042.

Where the testator orally declares that a certain devise is in trust, and that he must leave it entirely to the devisee's honor, and the devisee afterward makes similar admissions, declaring that it was a trust for young William Hoge, such declarations of the testator:

"have always been not only competent but powerful evidence of the fact declared,"

and equity holds the devisee in such cases as a trustee ex-maleficio in order to "get at him."

Gibson, Ch. J. in Hoge v. Hoge, 1 Watts, 163, p. 214.

"—the declarations of the deceased" husband and "*her* admissions from time to time" prevailed over the face of a deed.

“The law declares her to be a trustee *ex-maleficio* for the purpose of working out equity.”

Wolverton, J., in *Parrish v. Parrish*, 33 Ore. 486, 504-5.

When a rich man takes a poor child as his own, under an agreement with his father, a “right” is thereby vested in the *child* which is:

“derived *not* from the *contract* itself, but from what has been *done* under it, and the **WRONG** he would otherwise sustain.”

Waterman Spec. Perf., Sec. 54.

Crawford v. Wilson, 139 Ga. 654, 78 S. E. 30, 44 L. R. A. (N. S.) 773.

“It is impossible to estimate by any pecuniary standard the value to the parties taking a child.”

Chehek v. Battles, 133 Ia. 107; 8 L. R. A. (N. S.) 1130; 12 Am. Cas. 140; 110 N. W. 33.

“The contract was a parol one, it is true, but it was fully performed on the part of the plaintiff when she was transferred into the family of Mr. Healy and assumed towards him and his wife the relation of daughter.”

Healy v. Healy, 55 App. Div. 315, affirmed 166 N. Y. 624.

“The influences of a child of tender years in the home circle are too sacred and holy to be estimated in dollars and cents.”

Burns v. Smith, 21 Mont. 251-270.

An oral contract that a son, of virtual adoption, should have all the property of the father at his death, was followed in the course of time by a second marriage of the father; and the second marriage was followed by a *deed* of all his property to relatives of the new wife. The contract had to do with the property remaining at *death*, but the father was still *alive*; had to do with *all* his property, and here was a second *wife*.

The court, declaring it had "not been deterred from casting about to find some relief," set aside the sale as *fraud*, and decreed that the property be held for the son, *subject*, however, to dower, and suitable provisions as to use and improvement. Thus the son of virtual adoption received what *would* be a child's share under the laws of succession. It was by no means the mere question of enforcing or rejecting a contract. It was a just division on just principles.

Van Dyne v. Vreeland, 11 N. J. Eq. 370 and 12 N. J. Eq. 142, 158 (1858).

"As I read those authorities, they are not based solely upon the existence of a *promise*. This is a case where, in my judgment, equity should decree that to be done which the parties clearly intended."

Grant, J., in *Wright v. Wright*, 99 Mich. 170; 23 L. R. A. 196, referring to *Van Dyne v. Vreeland*, *supra*, and *Van Tine v. Van Tine*, 1 L. R. A. 155, a later New Jersey case.

Van Dyne v. Vreeland is cited and approved in nearly every case, since 1855, upon this subject. Cyc.

calls it the leading case. The decisions are many. I can cite and review but a few.

A very late case, much akin, which follows *Van Dyne v. Vreeland*, is *Rogers v. Schlotterbach*, 167 Cal. 35, 138 Pac. 728 (1914).

In the case last named an oral contract was made in 1851, that a son of virtual adoption, but not of legal adoption, should share alike with the father's own daughter. Manifestly the father could by a will disinherit his own daughter, and partly by deed, partly by will, he attempted to disinherit this *son*, and again the court, although declaring the case was "not entirely free from doubt," gave the son and the own daughter each one-half of the property *deeded* and the property *willed*. The court held that, 'The contract was substantially that he should have what *would be a child's share under the laws of succession.*' Pages 44 and 47.

In the same case Mrs. Roger's anxiety for the future welfare of the son was great, and she had caused Mr. Rogers to make a will in 1881, giving him one-half. On page 44 the court says:

"Her anxiety in this respect falls *but little short* of the recognition of an *obligation* on her part."

In the *Van Dyne* case, at page 149 of 12 N. J. Eq. the court says:

"He made several wills, and by the disposition of his property *recognized the agreement,*" although his *latest* will gave the son *nothing*.

"But there are other considerations tending strongly to establish appellant's hypothesis (that

of a contract). Every act of all persons concerned in changing the custody of this child from her natural parents to the Herricks, their subsequent conduct towards her and her relatives, her change of name, their practical adoption of her, and *recognition of contractual obligations in their respective wills*, all these must be considered, and are not only consistent with appellant's theory, but are *inconsistent with any other.*"

Fiske v. Lawton, 124 Minn. 85-88.

Hence the child in that case received the equivalent of the statutory child's share. Such is the spirit of the law in the state whence the complainant has pursued the defendant, and such is the spirit of the law of Oregon as shown in *Kelly v. Devin*, 65 Ore. 211, *supra*.

Carmichael v. Carmichael, 72 Mich. 78, 16 Am. St. Rep. 528, 40 N. W. 173 predicates a contract upon the circumstance of the two wills of a father and mother. The report may be searched in vain for any direct proof of a contract.

Bolman v. Overall, 80 Ala. 451, 2 Sou. Rep. 624. This is one of the cases that is strong on the probative importance of a will in such cases.

On page 150, 12 N. J. Eq. in the *Van Dyne* case, the Chancellor says, very significantly:

"And I may add that while she (the first wife) lived, defendant *never repudiated* his legal obligation."

In that case the grantee claimed he had no knowl-

edge of the agreement, but on page 152 the Chancellor says he had knowledge of facts from which some agreement, "*could be inferred.*"

In *Paul v. Snyder*, 52 Ind. App. 291, 100 N. E. 571 (1913), it was held a contract for a will might be inferred without *any* proof of oral negotiations, from the fact of a will and the surrounding circumstances.

In *Smith v. Cameron*, 92 Kan. 652 (1914), there was *no direct* proof of the oral contract which was found to have been made fifty years before.

The same principles are worked out in the New York cases. A contract that a child should share the same as if the promisor's own son, encountered the plausible argument that a man can disinherit his own son. But after an interesting discussion the court found this logical symmetry less important than the substance of intent and justice. The court concludes:

"Under the contract Gates should by testamentary devise have given him the whole."

Gates v. Gates, 34 App. Div. 608; 54 N. Y. S. 454.

Approved in *Winne v. Winne*, 163 N. Y. 262.

Other New York cases are similar. Circumstances vary, in cases of this character. We see the waves of fraud in these cases surge how they may, and we see the visitations of equity, as they "take the ruffian billows by the top."

"In the very nature of things nine years in the life of a child so changes conditions that it is out

of the power of any earthly tribunal to restore the parties to their original situation and environment, and the courts therefore compel them to stand upon and abide by the record they have made.”

“Rather than allow such a gross piece of dishonesty to go unredressed the court would struggle with any amount of difficulties, in order to perform the agreement.”

Oles v. Wilson, 57 Colo. 246, 262-3, 271-2 (1914),
141 Pac. 496.

“It is argued that her relatives were poor and that she had, in the family of Mr. Lynn a better home and more refined rearing than she would have had if he had not taken her. That may be; but it does not follow as a legal conclusion that the reward was all on her side or even that it was her gain at all. That she took the place of an only daughter in the lives of Mr. and Mrs. Lynn, and performed her part as such, is the cold fact which the law regards as a sufficient consideration to support the contract. How much she added to their happiness the law does not undertake to estimate. What her life would have been, if it had been left to flow in the channel that nature had given her, whether happier and better or the contrary, no one can tell * * *.”

Lynn v. Hockaday, 162 Mo. 111-126; 61 S. W.
885.

The Supreme Court of Minnesota in *Fiske v. Lawton*, *supra*, relies very much upon *Lynn v. Hockaday*.

The gentle pastime of killing off a husband and father is a circumstance more enlivening than any of these cases contain, and upon causes less acute we find the principles of equitable estoppel, under whatever name, conspicuous in the decrees of equity.

Dimond v. Mannheim, 61 Minn. 178, 181; 63 N.

W. 495. Mitchell, J. "Equitable estoppel in the modern sense arises from the 'conduct' of a party." "Its *foundation* is *justice* and good *conscience*."

Can any question remain about the *foundation* of this case at bar?

Woodcock's Appeal, 103 Me. 214, 68 Atl. 821;

125 Am. St. 291 (1907), holds that adoption imposes an obligation in morals, and thereupon the court *found* an obligation in law to make provision for the adopted child.

What is this, and what are all these, but splendid illustration that the rule of law can and will follow the rule of morals.

"* * * it is not material whether the promise be made before or after the service."

Thompson v. Stevens, 71 Pa. St. 161-170.

"* * * a past consideration * * * is equally meritorious."

"The services were rendered at her father's *request*, and on that the *law creates* a liability on his part to pay for them; it would be to reverse legal presumptions, to hold that because she failed to

haggle with her father as to the price of wages, she rendered the service as a gratuity." Specific performance decreed.

Warren v. Warren, 105 Ill. 568, approved in
Dalby v. Maxfield, 244 Ill. 214.

"This is not setting up anything in opposition to the will, but taking care that what has been *undertaken* shall have its *effect* * * * It is very proper that the person who undertook to duly act should *perform*, because I *must* take it, if Mrs. Ann Wilks had not so promised the testator would have altered his will."

"Therefore I am of opinion that such an undertaking by an executor or residuary legatee, before or after the will is made, ought to have its effect."

"The next question is whether this has been sufficiently proved? I think it has very clearly; for even sometime after the will had been made, Mrs. Ann Wilks declared she would not defraud the plaintiff, and there is a full evidence likewise of the undertaking by which she bound her own conscience."

Hardwicke, Lord Chancellor, in Drakeford v. Wilks, 3 Atk. 539.

"* * * all along the line it was steadily answered that the devise was untouched; that it was not at all modified; that the property passed under it, but the law dealt with the *holder*, for his *fraud*, and out of the facts, *raised* a trust ex maleficio, in-

stead of resting upon one as *created by the testator.*"

Curdy v. Berton, 79 Cal. 421-426; 21 Pac. 858;

5 L. R. A. 189; 12 Am. St. Rep. 157.

Judge Cooley speaking for the whole court, held a devisee to the duties of trustee, although there was no communication between him and the testatrix, and so far as appeared, he knew nothing of the will or devise until after the testatrix died. There were no admissions, but there were later circumstances against the devisee. It was considered a close case, but the right prevailed. *Hooker v. Axford*, 33 Mich. 452.

II.

The following are among the many cases where trusts were raised and enforced by construction, under various circumstances, but all against the general class of trustees, of whom John Hoge, Mrs. Ann Wilks, Mrs. Parrish, Livingston Axford, and Mrs. Guy L. Wallace are specimens.

The acceptance of the trust may be active. It may be tacit. "Its foundation is justice and good conscience." It is constructed, * * * "for the purpose of working out equity." It brings the culprit around in front where equity can, "get at him."

Estate of O'Hara, 95 N. Y. 403, 47 Amer. Rep. 53.

Dowd v. Tucker, 41 Conn. 197.

Laird v. Vila, 93 Minn. 45, 100 N. W. 656, 106 Amer. St. 420.

Norris v. Shephard, 20 Pa. St. 475.

Williams v. Vreeland, 32 N. J. Eq., 135 and 734 (Note).

Duval v. Duval, 54 N. J. Eq. 581, 90 (1880).

Gilpatrick v. Glidden, 81 Me. 137, 10 Am. St. 245. Many authorities and note.

Towles v. Burton, 24 Am. Dec. 409. Freeman's Extensive note.

Crossman v. Keister, 223 Ill. 69, 97 N. E. 58, 8 L. R. A. (N. S.) 698, note on p. 703.

Shields v. M'Auley, 37 Fed. 302, Dist. of Pa.

Edson v. Bartow, 10 App. Div. 104, 113.

M'Lellan v. M'Lean, 2 Head. 685.

Thymm v. Thymm, 1 Vern. 296.

Harris v. Horwell, Gill's Eq. 11.

2 Harg. 291-4-8.

Chamberlaine v. Chamberlaine, 2 Freeman, 34.

28 Am. & Eng. Enc. of Law, 885 (3).

III.

This record admits no doubt that the defendant is concealing something that Smith intended and directed for his family.

In all such trusts the rule of law is this:

"In a suit for an accounting defendant has the burden of proving *what allowances should be made to him.*"

Thatcher v. Hayes, 54 Mich. 184. Cooley, J.

"It is well settled that, when a *fiduciary relation is shown* to exist, and property or property interests have been *entrusted* to an agent or trustee, *the*

burden is thrown upon such agent intrusted, to render an account, and to show that all his trust duties have been fully performed, and the manner in which they have been performed. It is assumed, that the agent or trustee, has means of knowing, and does know what the principle or cestui que trust cannot know, and is bound to reveal the entire truth. (Marvin v. Brooks, 94 N. Y. 71.)"

Frethey v. Durant, 24 App. Div. 58-61. 39 Cyc. 476.

"* * * the burden is upon the trustee to make a proper and satisfactory accounting of the funds which came into her hands. If she does not do so, then every intendment is against her, and she should be *charged with all items not properly accounted for.*"

Cherug v. Ames, 138 Ia. 697; 116 N. W. 865-866.

"A gift obtained by any person standing in a confidential relation to the donor is *prima facie* void, and the burden is thrown upon the donee to establish to the satisfaction of the court, that it was the free, voluntary, unbiased act of the donor."

Jenkins v. Jenkins, 66 Ore. 12; 132 Pac. 542-3.

IV.

Mr. Smith's express agreement in 1900 and 1901, to leave the complainant all his property as modified at the time he engaged to marry the defendant, is confirmed

by his written admission of its practical equivalent, by the divorce obtained through his dictation, by his admissions and the defendant's admissions to third parties, by the fact that he was at all times dealing with one only child and daughter, and by all the ethics and circumstances of the case, and created a trust even *in his own hands*, which followed the assets into the hands of the defendant. Upon this point the following, are among the multitude of authorities.

Johnson v. Hubbell, 10 N. J. Eq. 332, 69 Am.

Dec. 773. Freeman's Note.

Teske v. Dittberner, 70 Neb. 544-46 (1903), 98

N. W. 57.

Burdine v. Burdine, 98 Va. 515, 524, (1900).

Oles v. Wilson, 57 Colo. 246, 141 Pac. 489.

Thompson v. Stevens, 71 Pa. St. 161.

Bolman v. Overall, 80 Ala. 451, 2 So. Rep. 624.

Jaffee v. Jacobson, 48 Fed. 21; 14 L. R. A. 352.

Clow v. West, 142 Pac. 226. (Nev. July 1914.)

Schutt v. Miss. Soc. 41 N. J. Eq. 115.

Savings Bank v. Hartshorn, 67 N. H. 156.

Daxies v. Cheadle, 31 Wash. 168; 77 Pac. 728.

Quinn v. Quinn, 5 S. D. 328; 49 Am. St. 875.

Lothrop v. Marble, 12 S. D. 511; 81 N. W. 885.

McCollum v. Mackrell, 13 S. D. 262; 83 N. W. 255.

MaCabe v. Healy, 138 Cal. 81; 159 Pac. 82.

Moline v. Carlson, 92 Neb. 419.

Heery v. Reed, 80 Kan. 380; 102 Pac. 846.

Schoonover v. Schoonover, 86 Kan. 487; 121 Pac. 485.

Emery v. Darling, 50 Ohio St. 160; 33 N. E. 715.

Rhodes v. Rhodes, 3 Sandf. Ch. 279.

Wellington v. Althorp, 145 Mass. 69.

Cook v. Ely, 116 N. W. 129—Ia.

Bridgewater v. Hooks, 159 S. W. 1004, Tex. (1913).

Fogle v. St. Michaels Church, 48 S. Car. 86.

Bruce v. Moon, 57 S. Car. 60.

Smith v. Pierce, 65 Vt. 200.

Price v. Price, 111 Ky. 771-79.

Harlan v. Harlan, 102 Ia. 701; 72 N. W. 286.

Martin v. Martin, 250 Mo. 539; 157 S. W. 575.

V.

Such trusts are favored in equity, especially when they constitute fair and proportionate family settlements.

Stearnes v. Hatcher, 121 Tenn. 332, 341 (1908).

Kelly v. Devin, 65 Ore. 211.

Shields v. M'Auley, 37 Fed. 302.

Carmichael v. Carmichael, 72 Mich. 78; 16 Am. St. 528; 40 N. W. 173.

Cominsky v. Cominsky, 21 N. Y. Supp. 611.

Oles v. Wilson, 57 Colo. 246, Supra.

VI.

Declarations of the testator and of the beneficiary which indicate a discrepancy between the intent of the decedent and the face of the will carry conviction in sit-

uations like this at bar. It is, therefore, under-statement to say that such declarations shift the burden of proof to the defendant.

Parrish v. Parrish, 33 Or. 486.

Drakeford v. Wilks, 3 Atk. 539.

Matter of Blair, 16 Daly, 540-549.

Lee v. Dill, 11 Abb. Prac. 214.

Dale v. Dale, 38 N. J. Eq. 274.

40 Cyc. 1154-5.

VII.

Slight and ancient oral evidence is sufficient.

Rogers v. Schlotterbach, 167 Cal. 35, Supra, 63 Years.

Fiske v. Lawton, 124 Minn. 85, Supra, 58 Years.

Smith v. Cameron, 92 Kan. 652 (1914), 50 Years.

Van Dyne v. Vreeland, Supra, 11 N. J. Eq. 370, 33 Years.

Martin v. Martin, 250 Mo. 539; 157 S. W. 575, 20 Years.

Healy v. Healy, 166 N. Y. 624, Supra, 21 Years.

Twiss v. George, 33 Mich. 253, 30 Years.

Stiles v. Breed, 151 Ia. 86, Supra, 42 Years.

Peterson v. Bauer, 83 Neb. 405, 408-9; 119 N. W. 767, 32 Years.

VIII.

The contract may be implied from the intent.

Wright v. Wright, 99 Mich. 170; 23 L. R. A. 196 Supra.

Burns v. Smith, 21 Mont. 251; 53 Pac. 742; 69 Am. St. 653.

IX.

No contract of original binding obligation need be shown.

Godine v. Kidd, 64 Hun. 585.

Winne v. Winne, 163 N. Y. 263, Supra, approves same.

Burns v. Smith, 21 Mont. 251, Supra, approves same.

Anderson v. Blakesly, 155 Ia. 430, approves same.

X.

When a new queen is the cause of mischief.

Parrish v. Parrish, 33 Ore. 486, Supra.

Thomas v. Maloney, 142 Mo. App. 193; 126 S. W. 522.

Van Dyne v. Vreeland, Supra, 12 N. J. Eq. p. 150.

Pfulger v. Pulz, 43 N. J. Eq. 440.

Gary v. James, 4 Desaus Eq. 185.

XI.

The fact that there is no other child claimant, or no claimant of the blood, tends to prove the alleged agreement.

Winne v. Winne, 166 N. Y. 263, Supra.

Kelly v. Devin, 65 Ore. 211, Supra.

Burns v. Smith, 21 Mont. 251, Supra.

Gates v. Gates, 34 App. Div. 608, Supra.

Godine v. Kidd, 64 Hun. 585, Supra.

Anderson v. Anderson, 9 L. R. A. (N. S.) 233
Kan. Supra.

XII.

The assumption of the filial relation, is the service which constitutes the real consideration in such cases, and the value of that consideration no financial scales can measure.

Weeks v. Lund, 69 N. H. 78.

Svanberg v. Fosseen, 75 Minn. 350; 78 N. W. 4.

Laird v. Vila, 93 Minn. 45; 100 N. W. 656,
Supra.

Bryson v. McShane, 48 W. Va. 126; 25 S. E.
848; 49 L. R. A. 527.

Fred v. Asbury, 105 Ark. 494; 152 S. W. 155.

Burns v. Smith, 21 Mont. 251 Supra.

Bridgewater v. Hooks, 159 S. W. 1004, Tex.
1(1913) Supra.

Chehak v. Battles, 133 Ia. 107; 8 L. R. A. (N.
S.) 1130.

XIII.

No consideration at all is needed for a contract to make a will unless it works injustice to creditors or others, even as between adults and strangers.

Krell v. Codman, 154 Mass. 454; 14 L. R. A.
860; 28 N. E. 578; 26 Am. St. 260, Holmes,
J. Especially is this so in favor of a child,
according to the decision in *Haines v. Haines*,
6 Md. 435.

Other cases on sufficiency of consideration are:

Elliott v. North, Trust Co., 178 Ill. App. 439.
March, 1913. An investment of \$500.00 might
there result in a profit of millions.

Brinton v. Van Cott, 8 Utah 480; 33 Pac. 218, three months' service of a girl sixteen, and an estate of \$5000.00.

Howe v. Watson, 179 Mass. 30; 60 N. E. 415, 38 hours service, and an estate of \$3800.00.

Burns v. Smith, 21 Mont. 251, Supra. Large estate.

Oles v. Wilson, 57 Colo. 246. Very large estate.

Craceford v. Wilson, 139 Ga. 54; 44 L. R. A. (N. S.) 773; 78 S. E. 30, Supra. Large estate.

Lothrop v. Marble, 12 S. D. 571, Supra. One month.

Harlan v. Harlan, 102 Ia. 701, Supra. Few months.

44 L. R. A. (N. S.) p. 734. Note.

"* * * property is of no value to a dead man, etc."

XIV.

The marriage of Mr. Smith and the complainant's mother was a consideration, which it would be according to the following case, a "heinous fraud" to disregard.

Nowack v. Berger, 133 Mo. 24; 34 S. W. 489; 55 Am. St. 663, 69.

XV.

This is not an attack on a will.

Drakeford v. Wilks, 3 Atk. 539, Supra, Hardwicke.

Curdy v. Berton, 79 Cal. 420, Supra.

Towles v. Burton, 24 Am. Dec. 409. Freeman's Note.

Estate of O'Hara, 95 N. Y. 403, Supra.

XVI.

In 1900, Mr. Smith strongly desired the complainant to stay with him, and he would be "likely to offer inducements."

Peterson v. Bauer, 119 N. W. 764; 83 Neb. 405, 408-9.

XVII.

The Probate Court had no jurisdiction of the matter of this suit.

Svanberg v. Fosseen, 75 Minn. 350, Supra.

Laird v. Vila, 93 Minn. 45, Supra.

Rogers v. Schlotterbach, 167 Cal. 35, Supra.

Oles v. Wilson, 57 Colo. 246, Supra.

Burns v. Smith, 21 Mont. 251; 53 Pac. 742, Supra.

Wright v. Wright, 99 Mich. 170; 33 L. R. A. 196, Supra.

Winne v. Winne, 166 N. Y. 263; 59 N. E. 832.

XVIII.

The plea of *res judicata* must be established beyond question. If there be "any uncertainty" the whole subject matter of the action "will be at large and open to a new contention." Where there are several grounds of demurrer or defense, and it does not certainly appear on what ground the demurrer was sustained, there is

no estoppel. And if there be alleged grounds in *abatement*, and others on the *merits*, it will be presumed that the order was *not* on the merits.

Russell v. Place, 94 U. S. 608; Field, J.

Must be "certain to every intent," p. 210.

"* * * if there be any uncertainty," * *

"if anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel."

Hoover v. King, 43 Ore. 281. Holds that the general rule is it will be presumed the order was not on the merits on such cases.

Kleinschmidt v. Binzel, 14 Mont. 31, 59.

Thorough discussion and citation of authorities, and to same effect.

Bissell v. Spring Valley Township, 124 U. S. 225, p. 232. Recognizes this distinction.

Chrisman v. Harman, 29 Gratt, 494; 26 Am. Rep. 387, 390. The court says: "Six causes of demurrer were specifically assigned." Held no bar. "I am satisfied that justice had been done."

Fahey v. Esterly Machine Co., 44 Am. St. 554, p. 566. 3 N. D. 220, Corliss, J. "The least uncertainty," is "fatal." Excellent note to this case on pp. 563 to 567.

Griffin v. Seymour, 15 Ia. 30. The court says: "It is not to be presumed that the court would pass upon the merits of the case after having determined that the proper parties were not before him."

Packet Co. v. Sickles, 5 Wall. 580, 593.

Estep v. Marsh, 21 Ind. 190.

Penouilk v. Abraham, 43 La. Ann. 214. "Must be established beyond doubt."

Lindley v. Snell, 80 Ia. 109. "If there be any uncertainty," the whole matter is at large.

Lewis v. O. N. & P. Co., 125 N. Y. 348. Peckham, J., holds must show affirmatively upon which of two possible distinct and different facts the judgment proceeded.

Stone v. St. Louis Stamp Co., 155 Mass. 267, 272. General denial in former suit put in issue. Other matters not questioned in this suit. Held no bar.

Lea v. Lea, 99 Mass. 493; 96 Am. Dec. 772, 775. No means of determining upon which of three grounds of defense former verdict rendered, and hence no bar.

Stowell v. Chamberlain, 60 N. Y. 272, p. 277. If the judgment was "by reason of the insufficiency of the complaint—formal defects not touching the merits," there was no bar.

Gerrish v. Brewster, 6 Minn. 53.

The court says: "What the defect in the pleadings was does not specifically appear." Defect in "insufficiency or informality in the statement of the cause of action," not a bar.

XIX.

No final judgment was entered, and without that there can be no estoppel. (Rec. pp. 69, 70, 71, 90.)

Giant Powder Co. v. Ore. & West. Ry. Co., 54 Ore. 325.

Hoover v. King, 43 Ore. 211; 72 Pac. 880.

Clearwater v. Meredith, 1 Wall. 25, 43.

Judgment of nil capiat should be entered when it appears that the complainant had no cause of action on demurrer.

Aurora City v. West, 7 Wall. 82-99.

“* * * A judgment that a declaration is bad, can not be pleaded as a bar to a good declaration for the same cause of action, because such judgment is in no just sense a judgment upon the merits.”

Gilman v. Rivers, 10 Pet. 301. Same.

Gerrish v. Pratt, 6 Minn. 53.

Swanson v. Gt. North. Ry. Co., 73 Minn. 105; 75 N. W. 1033, “judgment of dismissal on the merits with costs,” was there rendered in sustaining a demurrer.

Carlin v. Brackett, 38 Minn. 307; 37 N. W. 342.

Upon sustaining a demurrer judgment was entered “that the plaintiff take nothing by the action.”

Oregonian Ry. Co. v. Navigation Co., 27 Fed. 277. Deady, J., holds a decision on demurrer is a bar “if a final judgment is given.”

Alley v. Nott, 111 U. S. 472-75. A removal case. “* * * if final judgment is entered on the demurrer it will be a final determination, etc.”

XX.

The complaint in the Minnesota case of the complainant did in fact state a cause of action. Counsel have ventured no such attack in the present case. The court will not for the purpose of finding a prior adjudication presume that the order of the court disregards the law.

Laird v. Vila, 93 Minn. 45. Did state cause of action.

Svanberg v. Fosseen, 75 Minn. 350. Did state cause of action.

Linton v. Crosby, 61 Ia. 401.

The court says: "We will not for the purpose of finding a prior adjudication presume that the court made an erroneous ruling, in the absence of all evidence tending to show that it did."

Rodman v. Mich. Cent. Ry. Co., 59 Mich. 395-99; 26 N. W. 651.

The court says: "The changes made in the old declaration in framing the one in suit remedied the defects complained of, if any existed, and the fact that no demurrer was interposed to the one in the present case would indicate that a different view was not very strongly entertained by defendant's counsel."

"How can it be said that the merits of a plaintiff's case have been passed upon when the declaration does not state his case, or any merits, I am not able to comprehend." Cited by Taft, J., in 62 Fed. 697.

McLaughlin v. Kelly, 22 Cal. 212, 223. "When

there has been a fair trial of such an issue, courts usually give the verdict and judgment a final and conclusive effect, etc.”

There is nothing to show whether the demurrer was sustained in Minnesota to the complainant's complaint upon the merits, or on some of the three grounds of demurrer in abatement. If there is any uncertainty at all litigants cannot be denied a trial.

But on the other hand, there is this certainty, namely, that the case of *Laird v. Vila*, 93 Minn. 45, was decided in the Supreme Court of that state about three years before this demurrer was decided in a lower court. It was held in *Laird v. Vila*, as it is almost everywhere, that these frauds upon women and children in relations of faith and trust are *not* beyond the reach of jurisprudence.

No one has as yet had the hardihood to say in the present case that the fraud alleged in *Laird v. Vila*, could be brought to justice, but the fraud alleged against the defendant should in truth, as a matter of law, forever go free. Ignorance of *Laird v. Vila* is the only ground on which that demurrer could have been sustained on the merits. Judicial ignorance will not be assumed if there is a possible alternative. There is an alternative. *The position of the defense is therefore a reductio ad absurdum.* The position of counsel in effect is that a court in Minnesota illegally denied the complainant's right of trial, and illegally perpetuated a child robbery, which for the purpose of that case was in all things admitted.

Defendant is as destitute of conscience as she is of law. Find this defense where you may, its badge is still the same.

The judgment was that the demurrer be sustained, in the Minnesota case. There was no judgment of dismissal, or *nil capiat*. It was not a final judgment, without which there is no bar.

XXI.

In *Lindsley v. Union Silver Min. Co.*, 115 Fed. 46, there was *no* demurrer upon grounds in abatement, *no* uncertainty, and *no* defect in the judgment. Such is the only case cited by the trial court upon the question of *res judicata*, and how of the law of the merits?

XXII.

The trial court says:

"It may be conceded *without inquiring*, but *without deciding*, that such and kindred agreements in parol are legally sufficient to justify their enforcement, but with the qualifications first, that they must be reasonably definite and certain; second that they must be established by clear full and **IRREFRAGABLE** evidence; and, third, they must have been performed to such an extent and in such a manner that the beneficiary cannot be properly compensated in damages."

There the court *stops*, citing *Robertson v. Corcoran*, 125 Minn. 118, 145 N. W. 812, and earlier Minnesota cases.

Let us *recite* the *law* as laid down in *Robertson v. Corcoran*. The court says:

“It is *well settled* that a person may by contract bind himself and his estate to give or will his property to certain designated persons at his death. (Citing cases.)

“It is *likewise well settled* that even if such contracts rest in *parol*, the courts may in proper cases enforce specific performance thereof. ¹(Cases.)

“But to authorize a court to decree the specific performance of an oral contract to give property by will, the contract must *appear reasonable*, and be **CLEARLY AND SATISFACTORILY** established; and it must also have been performed on behalf of the beneficiary to such an extent and in such a manner that he cannot be compensated properly in damages. If the part performance relied upon, consisted in the rendition of services, the value of which *can reasonably be measured in money*, specific performance will not be enforced, and the promisee must have recourse to other remedies. (Cases cited.)

“*If, however, the part performance consisted IN ASSUMING A PECULIAR PERSONAL AND DOMESTIC RELATION, AS A MEMBER OF THE FAMILY, of the promisor, and in giving him the society and services incident to such relation, and of a kind and character the value of which is not measureable in money, specific performance may be granted if the contract be satisfactorily proven.*” Citing *Svanberg v. Fosseen*, 75

Minn. 350, 78 N. W. R. 4; 43 L. R. A. 427; 74 Am. Stat. 490, where the court says:

"It is a fair inference that these childless old people regarded these nieces with a love and affection *almost akin* to that of parents for their own children, and, in return, the services and society of these children to them were of great benefit and pleasure. The value of such society and services to their uncle and aunt is *incapable of measurement in money.*" Citing cases.

Such cases as this are, therefore, "* * * incapable of measurement in money," and no error could be more obvious than that of repulsing such just demands as this by use of the term "*irrefragable.*"

"The law applicable to these questions is too well settled to justify any extended discussion."

Haubrick v. Haubrick, 118 Minn. 394-7; 136 N. W. R. 1025, 6.

This decree will not bear the light of the facts and it will not bear the light of the law.

"* * * it is out of the power of any earthly tribunal to restore the parties to their original situation and environment and the COURTS THEREFORE COMPEL THEM TO STAND UPON AND ABIDE BY THE RECORD THEY HAVE MADE."

Healy v. Simpson, 113 Mo. 340-346-7; 20 S. W. 881-83.

Burns v. Smith, 21 Mont. 251, 270-71; 53 Pac. 742-46.

Oles v. Wilson, 57 Colo. 246-262-3; 141 Pac. 489-95.

Who will say that this is not law? Who will say it is law for another case but not for this case; and all to the glory of a wrong more debasing than primogeniture, shockingly unequal, shockingly un-American? Why not exercise every intendment *against* this wrong? Why exercise every intendment *for* this wrong?

Deference toward the courts results from all a lawyer's training and education. I look upon a court of equity as the right arm of God on earth. With that reverent feeling I enter the sanctuaries of justice. And as I appear before this high tribunal, I pray, that when I shall stand in turn before the great and final Judge, the Alpha and Omega of all law and all judgment, I may be found to have so contributed to the administration of justice here, that I may find mercy there.

If the oppression which this family has suffered is to be perpetuated, I strive that it may be on some other oath but mine. I have endeavored, as best I can, in this matter to make full proof of my ministry.

Very respectfully submitted,

WM. H. HALLAM,

Solicitor for Appellant.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

No. 2849

ELIZABETH M. PRICE,

Appellant.

vs.

MARIE DEWEY WALLACE,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.

Brief of Appellee
and

Memo on Motion to Dismiss

ERSKINE WOOD,
WOOD, MONTAGUE and HUNT,
Solicitors for Appellee,
Portland, Oregon.

H. V. MERCER,
Counsel for Appellee,
Minneapolis, Minn.

FILED
SEP 18 1900

F. O. MONTAGUE

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MEMO ON OBJECTION TO APPELLATE ISSUES AND
MOTION TO DISMISS.

With a solemn judgment of the State of Minnesota standing against appellant in this *same* controversy, and with more than one year to construct an argument for appellant to be filled in by record pages and thrust upon us with only ten days to answer, and with Assignment of Errors which, in the main, left concealed such points as counsel desired to make until we received his brief, we feel that the spirit of the Equitable Procedure of this Court has been violated so greatly to the prejudice of Appellee that our duty impels us to call the whole matter to the *Court's* attention, so that it may enforce its rules; or, if *this Court* decides it

to be a case where an exception should be exercised, that it will then appreciate that the appellant is using a "shot gun method" at a target where we can fire but rifle balls, and that we are compelled to shoot at an imaginary mark set up after his shot, guessing that it hits where he supposed, when he shot, the mark should be.

Under such circumstances, we point the court to its rules and trust for their enforcement with a dismissal; but if the court disagrees with us upon that motion that it will then treat a shot at the real mark as sufficient even though it happens not to cover a tiny speck made by a segregated shot in its "dying hour."

We claim that the substantial procedure, provided to make issues for trial in this court has not been sufficiently followed to make actual issues for appellee to answer or the court to decide.

There is no pleading in the appellate court to formulate issues except the Assignment of Errors filed with the Petition for Appeal. Both court and counsel are entitled to know what the appellant charges against the decision of the lower court.

If an appellant has only a general notion that he would prefer to scold about a trial decision than to find, and point out, error, then his privilege may be exercised without annoying the appellate tribunal; but if there is a reasonable basis for claiming error, upon controlling points in the case, then it is the privilege, and likewise the duty, to assign those errors as claimed upon the particular points and let issue be taken upon them by concrete application of systematic jurisprudence to the particular case.

Upon this principle all of the Appellate Federal Courts agree. Original Rules of all the Circuit Courts of Appeal, 90 Fed. CXLIII, points the way to all appellants.

Rule XI requires that the Assignment of errors

"Shall set out separately and particularly each error asserted and intended to be urged." 90 Fed. CLXVI.

Rule 24 (90 Fed. Ch. CL§IV), provides that:

“A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised. * * * In cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is erroneous.”

With no attempt to show in the Assignment of Errors (Rec. pp. 115-119), where, in the transcript, or in the brief (pp. 34-37), where, in the record, exceptions were taken or could be found as to any of the alleged errors as to the decree; with no attempt to point out separately or particularly any error intended to be urged as against the merits of the decree intended to be raised as required by Rule XI, *supra*, or any particular in which the decree was claimed to be erroneous, as required by Rule 24, *supra*, the appellant asks us to answer the following *Assignment of Errors*. Rec., p. 115, Brief, p. 34.)

ASSIGNMENTS OF ERRORS.

“Complainant in the above entitled suit assigns the following errors, to-wit:

I.

“The court erred in its judgment and decree wherein and whereby the court ordered adjudged and decreed that the bill of complaint herein be dismissed.

II.

“The court erred in denying the complainant the relief for which she prayed in her bill of complaint.

III.

“The court erred in rejecting the complainant's offer in evidence of the certain letter of C. A. Brown to the complainant, marked as complainant's Exhibit “F.” which letter is in words and terms as follows:

(Here follows said letter in full.)

IV.

“The court erred in rejecting the complainant's offer in evidence of the authenticated copy of in-

ventory of the estate of Peter B. Smith, verified by the defendant herein, which inventory was so offered by the complainant as complainant's Exhibit 'G,' and marked and designated as such.

"WM. H. HALLAM,
"Solicitor for Complainant."

We may possibly find some reference to the last two in some remote corner of the brief, but not yet.

It is our contention that this procedure is a direct and fatal violation of the worst sort, of both the spirit and substance of Rules XI and XXIV, and the decisions of *this* and other courts in the following particulars:

1. *No exceptions pointed out.* No manner of raising any of these points below, or any place where any preservation of error is found, in the Assignment of Errors itself, ~~stance of Rules XI and XXIV, and the decisions of this, and other, courts) in the following particulars:~~

or in the brief of counsel, where they are specified (Brief p. 34), and no division of either statement or law is made to aid us in what is meant to be the argument applicable to either of the first two errors; we find a brief reference to the letter in the third assignment on pp. 37-38, by searching the brief; but that letter which is quoted, if properly offered and the proper preservation of exception were pointed out, is so utterly foreign to the defendant, as to be wholly without debatable ground.

The same is true of the inventory unless the court desired to go into an accounting before deciding one to be necessary.

Without assigning the points as error counsel "indicates" his "position" at pages 3 and 4 of Appellant's Brief; but even these are not indicated under systematic discussion.

If counsel has exceptions, as he may have somewhere as to two of his alleged errors, although we have not yet found them, it was for him to point them out.

In *Migcon et al vs. Montana Central Co.*, 77 Fed. 249-258, *this* Court said at 252 of Rule 24:

"A strict compliance with these provisions would not only be of great advantage to counsel in their arguments, but would materially aid the court, and lessen its labors. It is the duty of an appellant to particularly point out the alleged error upon which he relies, and to directly refer the court to the page of the transcript where the alleged erroneous ruling of the court is to be found. Mr. Gillie's testimony covers 25 pages of the printed record, no portion of which is quoted in the specifications."

Here we have a record of 611 pages.

2. *No particular errors are pointed out in the decree; but the brief makes many suggestions of intended applicability to something.*

As to the first two errors assigned, we think they are entirely too general. They are really meant to raise only the general question of whether the court should have rendered a decree for defendant or granted the relief sought for complainant. It seems to us that the language of this Court in Doe v. Waterloo Mining Co., 70 Federal 455-461 (9 C. C. A.) is controlling here:

"There are some nine assignments of error in the transcript. In the brief seven additional assignments of error are made. Appellee maintains that the court should not consider these additional assignments; that rule 11 of this court (47 Fed. vi.) precludes the court from considering them, except on its own motion. The contention of appellant is that these additional assignments are only specifications under the first assignment of error. Rule 11 of this court requires that the assignments of error shall be separately and particularly set out. The object of setting forth assignments of error is to apprise the opposite counsel and the court of the particular legal points relied upon for a reversal of the judgment of the trial court. The attempt to make the assignments of error more particular in a brief is not proper. It is in fact an attempt to amend the record in this particular without permission of court. The assignment of error in question reads as follows: '*There is error in said decree, in this: that said court, upon the whole evidence, should have rendered a decree in favor of the complainant.*' This is too gen-

eral. There is no specification showing wherein the decree is not supported by the evidence. It is not correct that the seven additional assignments of error are specifications under this assignment."

Counsel has sought to do in this case what this court condemned in the above case.

Other circuits agree.

The Doe case, *supra*, is cited by Circuit Judge Smith in "specially concurring" with the opinion of the Eighth C. C. A. in *Walter Baker & Co. v. Gray*, 192 Fed. 921-929:

"Rule 11 of this court provides that the appellant shall file with the clerk of the court below an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged, and errors not assigned according to this rule will be disregarded, but the court at its option may notice a plain error not assigned. Of course, the last clause is wholly immaterial here as the majority hold there was not only no plain error, but no substantial error. The only assignment of error in this case is:

'That said court erred in dismissing said complainant's bill with costs to the complainant in denying to the complainant an injunction in the term as prayed for in said complainant's bill of complaint, and in refusing to direct an accounting of profits and damages.'

In my judgment this is a wholly insufficient assignment of errors. *Stevens v. Gladding*, 19 How. 64, 15 L. Ed. 569; *Oswego Township v. Travelers' Insurance Co.*, 70 Fed. 225, 17 C. C. A. 77; *The Myrtie M. Ross*, 160 Fed. 19, 87 C. C. A. 175; *United States v. Stone & Downer Co.*, 175 Fed. 33, 99 C. C. A. 49; *Deering v. Kelly*, 103 Fed. 261, 43 C. C. A. 225; *Louisiana Co. v. Levee Commissioners*, 87 Fed. 594, 31 C. C. A. 121; *United States v. Ferguson*, 78 Fed. 103, 24 C. C. A. 1; *Doe v. Waterloo Min. Co.* 70 Fed. 455, 17 C. C. A. 190; *Smith v. Hopkins*, 120 Fed. 921, 57 C. C. A. 193.

Rule 24 (188 Fed. xvi) provides the brief shall contain a specification of the errors relied upon, and in cases brought up by appeal the specification shall state as particularly as may be in what decree is alleged to be erroneous. There is a total

absence of any pretense of compliance with this rule, and the case can properly be affirmed, and the appeal dismissed for this reason. *City of Lincoln v. Street Light Company*, 59 Fed. 756, 8 C. C. A. 253; *Woodmen of the World v. Jackson*, 97 Fed. 382, 38 C. C. A. 208; *Western Assur. Co. v. Polk*, 104 Fed. 649, 44 C. C. A. 104." *Walter Baker & Co. v. Gray*, 192 Fed. 921-929.

In the case of *United States v. Ferguson*, 78 Fed. 103 (2 C. C. A.), at 105 it is said:

"The seventh assignment alleges as error that the court erred in rendering a judgment against the defendant; and the eighth, that the court erred in not rendering a judgment in favor of the defendant. These assignments do not comply with the rules, as they fail to point out any particular error asserted and intended to be urged. Whether they mean that a wrong result was reached because the facts were erroneously decided, or because the court erred in applying the law to the facts, can only be conjectured. Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 12 C. C. A. 350, 63 Fed. 891; Oswego Tp. v. Travelers' Ins. Co., 17 C. C. A. 77, 70 Fed. 225; Doe v. Mining Co., 17 C. C. A. 190, 70 Fed. 455." United States v. Ferguson, 78 Fed. 103.

In the case of *Flagler v. Kidd, et al.*, 78 Fed. 341 (2 C. C. A.), the court said:

"The assignments of error are defective, because they merely state that the judgment should have been for the defendant instead of the plaintiffs, and that neither the complaint nor the findings state any good cause of action." They fail to point out any 'particular error asserted and intended to be urged,' as is required by the rule. As was said by the court of appeals for the Seventh circuit (Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 12 C. C. A. 350, 63 Fed. 891), 'an assignment of errors cannot be good if it is necessary to look beyond its terms to the brief for a specific statement of the question to be presented.' See also Oswego Tp. v. Travelers' Ins. Co., 17 C. C. A. 77, 70 Fed. 225; Doe v. Mining Co., 17 C. C. A. 190, 70 Fed. 455."

In *McFarlane v. Golling, et al.*, 76 Fed. 23 (7 C. C. A.), the court said:

"By the second clause of rule 24 of this court (11 C. C. A. ex., 47 Fed. xi.) the specification of error in a case brought up by appeal is required to 'state as particularly as may be in what the decree is alleged to be erroneous.' There is here no specification which designates any particular in which the decree is supposed to be wrong or defective. The nearest approximation to it is the twelfth specification, which says, '*The court erred in directing a decree for the complainants without considering and providing for the just and equitable claim of the defendant;*' but that is hardly less general and indefinite than the next specification, which is that '*the court erred in disregarding the equities of the controversy.*' It should not be necessary to look to the appellant's brief to learn the meaning of his assignment of errors. *Grape Creek Coal Co. v. Farmers' Loan & Trust Co.*, 12 C. C. A. 350, 63 Fed. 891, and 24 U. S. App. 38."

In the case of *Sovereign Camp, etc. v. Jackson*, 97 Fed. 384 (8 C. C. A.), the court had under consideration the same method here employed and said:

"Rule 11 is that each error asserted and intended to be urged shall be separately and particularly pointed out, not generally averred. None of the errors asserted in the argument, none of the questions of law or of fact there discussed, are pointed out in this assignment particularly or at all. Rule 24 requires the specification in the brief to state as particularly as may be in what the decree is alleged to be erroneous. *The statement and discussion in the argument of the questions to which we have referred demonstrate the fact that a more particular statement of the errors in the decree might have been made than that which was contained in the assignment, because such a statement was made in the argument. The assignment and the specification alike utterly fail to comply with the express terms of the rules. Nor are they more fortunate in serving the purpose to accomplish which these rules were made. Assignments and specifications of error were required for the purpose of informing the court and*

the counsel for the opposing party what questions would be presented for consideration and review in the appellate court. An assignment which fails to point out these questions—one which compels court and counsel to look further and to search the brief in order to discover them—entirely fails to accomplish the purpose of its being, and is utterly futile. The assignment and the specification in the case at bar are apt illustrations of such a failure. They suggest none of the questions of law or of fact which the argument contained in the brief presents for our consideration. City of Lincoln v. Sun Vapor Street-Light Co., 19 U. S. App. 431, 434, 8 C. C. A. 253, 254, and 59 Fed. 756, 758; Oswego Tp. v. Travelers' Ins. Co., 36 U. S. App. 13, 17 C. C. A. 77, and 70 Fed. 225; Van Gunden v. Iron Co., 8 U. S. App. 229, 248, 3 C. C. A. 294, 296, and 52 Fed. 838, 841; Grape Creek Coal Co. v. Farmers' Loan & Trust Co., 24 U. S. App. 38, 45, 12 C. C. A. 350, 353, and 63 Fed. 891, 894; Doe v. Mining Co., 44 U. S. App. 204, 214, 17 C. C. A. 190, 196, and 70 Fed. 455, 461."

In the case of *Deering Harvester Co. v. Kelly*, 103 Fed. 261, at 261 (6 C. C. A.), the court said:

"The second, third, and fourth assignments of error are mere general complaints that the judgment was rendered for the wrong party. Such assignments are not such as the rule requires, and they present no question which we can recognize. The eleventh rule of this court (31 C. C. A. cxlvi., 90 Fed. cxlvi.) requires that the assignment 'shall set out separately and particularly each error asserted and intended to be urged; and errors not assigned by this rule will be be disregarded, but the court at its option may notice a plain error not assigned.' Railroad Co. v. Cutting, 16 C. C. A. 597, 68 Fed. 586; Doe v. Mining Co., 17 C. C. A. 190, 70 Fed. 455; U. S. v. Ferguson, 24 C. C. A. 1, 78 Fed. 103; Hart v. Bowen, 31 C. C. A. 31, 86 Fed. 877." 103 Fed. 264.

In the case of *Lloyd v. Chapman*, 93 Fed. 599 (9 C. C. A.), *this Court* said:

"In Doe v. Mining Co., 17 C. C. A. 196, 70 Fed. 456, this court said its purpose is 'to apprise the opposite counsel and the court of the particular legal points relied upon for a reversal of the judg-

ment of the trial court; and, further, that 'the attempt to make the assignment of errors more particular in a brief is not proper.' 'It is in fact,' said the court, 'an attempt to amend the record in this particular without the permission of court.'

We are thus met face to face with a charge that the court should not have dismissed the bill on the merits and should not have refused plaintiff relief. No attempt is made in the Assignment of Errors to point out wherein the court so erred, whether by erroneous application of law to the facts, or erroneous finding of facts, or failure to find material facts, or even failure to grant supposed sympathy; but the case is argued upon supposed principles of error as to conscience, both human and Divine, and law, flitting from earth to heaven like an air fleet dodging war projectiles. (See Appellant's Brief, p. 15.)

Attempted segregation, in some instances, of both facts and law, exists in spots in counsel's brief; but there is not that sort of objections to the decree made in the assignment or specification, or that application of law to particular errors, that would, in the slightest degree, inform either counsel or court of the particulars of error claimed, either of fact or law in the decision below. We are not warned of any particular thing upon which to meet a controversy or prepare aid for the court. In such procedure counsel may be taken by the greatest surprise.

In conclusion, therefore, we think this an eminently proper case for the court to say that the time has about arrived for the defendant to be freed from further expense, annoyance, and wholly unfounded charges in one court after another, rather than to attempt to find a way around these rules. If error existed both counsel and court are entitled to know what, and where, it is. *We think this ap-*

NOTE.

peal should be dismissed

First, if the court denies the motion to dismiss, we shall find ourselves face to face with answering a brief

that we do not consider complies with, or gives a fair representation of, the facts, the rules of court or applicable law, or limited to the errors assigned. It is almost, if not actually, scandalous as to defendant in places. (Appellants Brief pp. 26).

In many of the instances claimed to be facts for appellant, no attempt is made to point out the pages of the record where the evidence may be found or the exception shown as required, or at all.

In many, and we might say most all, of the things stated as *facts* where the record is not cited, counsel may be excusable for the minor error of want of citations, because the citations do not exist; but we suppose this rule will relieve us from following up each half fact mixed with the fancy or fiction, and repeating the whole truth and point-out the fancy and fiction, if we point out the real facts succinctly and give the citations to the record so that the court can get the real truth as distinguished from the over-zealous fancy of our learned brother.

Second, there is such an imaginative argument, based upon eloquent hope, without that degree of fact, or record citations necessary to point *this Court* to the real truth, that we feel called upon to attempt to give the court the facts in the record, as distinguished from the visions in "Fairyl-land."

Third, we have not had sufficient time to make as clear and concise an argument as this case warrants, or the Court deserves in a case of this importance, but we shall have to ask the Court's indulgence in that regard, for we believe it ample.

Fourth, we do not wish to engage in any controversy with counsel as to whether his views of religion should be the controlling measures of this case, as he so frequently tenders in his brief; nor to cast any reflections upon his zeal or fervor, much less to criticise Holy Writ; but only to call

attention to the sort of religion that courts of conscience must apply on earth to prevent the destruction of dead men's estates and the pauperizing of their widows and orphans by fictitious stories of persons who regard it easier to concoct tales of dead men's conversations with which to loot their estates after the truth is sealed with their lips in death, than to create wealth by regular methods.

One of the opinions in the New York Court of Appeals, *Ide v. Brown*, 70 N. E. 101, puts a damper upon the sort of frenzy into which ambitious counsel can work themselves in behalf of such contentions, by the warning that it has previously indicated that such contracts are dangerous.

"Such contracts are dangerous. They threaten the security of estates, and throw doubt upon the power of a man to do what he wills with his own. The savings of a life-time may be taken away from his heirs by the testimony of witnesses who speak under the strongest bias and the greatest temptation, with all the dangers which, as experience shows, surround such evidence. The truth may be in them, but it is against sound policy to accept their statements as true, under the circumstances and with the results pointed out. Such contracts should be in writing, and the writing should be produced, or, if ever based upon parol evidence, it should be given or corroborated in all substantial particulars by disinterested witnesses. Unless they are established clearly by satisfactory proofs and are equitable, specific performance should not be decreed. We wish to be emphatic upon the subject, for we are impressed with the danger, and aim to protect the community from the spoilation of dead men's estates by proof of such contracts through parol evidence given by interested witnesses."

The defendant seeks such protection.

STATEMENT OF CASE.

DECISION BELOW. This case comes here on appeal from a decree refusing to grant the plaintiff any relief, (see Record of Decree and Opinion, Rec., p. 99114; see 224 Fed. 76), because):

1. She had once litigated the same case to final decision on a demurer interposed, among other causes, to the merits in the State Court in Minnesota when the estate in question was probated.

2. After a careful examination of the pleadings and a full taking of the evidence and careful study of the witnesses and their demeanor and versions, as well as the documentary evidence, the Trial Court concluded that there was no merit in plaintiff's case on the facts, as the Minnesota Court had concluded on the demurrer.

It was our contention below, and is our contention here, that no reasonable ground exists for upholding plaintiff's contentions as a matter of equity; but that the merits cannot again be legitimately reconsidered, so long as the rule of *res adjudicata* of this Court exists, or so long as the "Full Faith and Credit Clause" of the Federal Constitution, Article IV, Section I is "*read and believed.*"

NATURE OF CASE AND APPEAL.

This controversy grows out of the estate of one Peter B. Smith. See Complaint Rec. pp. 2-24. The plaintiff, who has been twice married and has two sons, none of whom are related to him or to defendant, brings this action to have the defendant declared a trustee of two-thirds of the estate of Mr. Smith, one-third for plaintiff and one-third for her sons, upon the theory of an alleged oral agreement with Mr. Smith that the property should ultimately so go. The defendant was the wife of Mr. Smith at the time of his death; he will all of his estate to her absolutely; she was made the executrix in his will; she probated the estate at Minneapolis, Minnesota, where Mr. Smith lived at the time of his death, and without any claim of heirship being made in the Probate Court (see Statement of Admissions, Rec., p. 204).

About five months after the Probate Court had decreed the property to defendant, plaintiff brought action in the

State District Court of Hennepin County, Minnesota, in 1908 (Rec., p. 49), that being the State Court of general jurisdiction both at law and in equity (Rec. p. 92); the first case was brought in the State District Court at Minneapolis, Minnesota; a demurrer sustained to the complaint upon the merits, with privilege of pleading over; appeal was taken and time to replead passed and judgment was entered for defendant sustaining the demurrer and giving costs of \$7.50 against the plaintiff; an appeal was taken and abandoned (See Exemplified Record attached to Answer, Rec. pp. 49-90).

The defendant moved to Portland, Oregon; six years elapsed; a new action was brought for the same purpose and upon the same theory (See New Complaint, Rec. p. 224). The former judgment is pleaded in bar; a plea to the merits is also made; also that if any claim existed, it was barred by not being proven in the Probate Court and by estoppel and laches; the public policy of Minnesota is inrevoked, (See Answer pp. 25-39).

The Parties and Their Marriages.

The defendant was the third wife of one Peter B. Smith, who married him on the 14th day of May, 1902, at Fargo, North Dakota, (Rec. pp. 204-5), and immediately went to live with him at his home in Minneapolis, Minnesota, where she continued to reside as his wife until the 16th day of August, 1907, when he died leaving the will in which he gave to the defendant all of his property both real and personal (Rec. pp. 205-6). After the first litigation was over, defendant married Mr. Guy L. Wallace, with whom she now resides, in Portland, Oregon.

The plaintiff is no relative of the defendant, either by blood or law, but was the step-daughter of Peter B. Smith because she was the daughter of his second wife, Mrs. Lilly D. Ailes, to whom Mr. Smith had been married on July 12, 1893, after Mrs. Ailes had been divorced from Lyman D.

Ailes, (Rec. p. 205), plaintiff's own father who is still alive and the plaintiff and her two sons now reside with him,

Her mother had died on June 12, 1900; prior to that time, the plaintiff had been called by the name of Smith a great deal of the time and Mr. Smith had called her his adopted daughter; but she and her mother had refused to allow Mr. Smith to adopt her because they thought her own father's mining interests in Alaska might be cut off, (Rec. pp. 167-170). Counsel and court agreed at the trial that adoption was not claimed, (Rec. pp. 167-170). Under her own name, she had gone to Europe with her own father, Mr. Ailes, and was married in London, under her own name, to one Donald MacLean, a surgeon in the United States army, without telling her stepfather of her intention to even become engaged, and from that marriage there was an issue of the two sons mentioned in this case, and for whom the plaintiff claims one-third of the Smith estate.

Prior to the death of her own mother she had been living away from Minneapolis with her husband and they both came to live with Mr. Smith. She was divorced from Donald MacLean on January 9, 1902, in a suit instituted in the fall of 1901, in Minnesota, (Rec. p. 257), but not until she concluded that he could not support her, (Rec. pp. 241-2). In the trial of that suit she and Peter B. Smith were the only witnesses to give evidence and the state court at Minneapolis, that tried that case, found, as a fact, that she and her husband, Donald MacLean, had come to live with Mr. Smith, under an arrangement by which she was to be his housekeeper and live at the expense of Mr. Smith for herself and the family, while Dr. MacLean should attempt to establish a private practice in medicine there, and that that arrangement was made *to continue over one year*, (Rec. p. 257).

The plaintiff and her two sons continued to reside with Mr. Smith at his home in Minneapolis where he lived and

kept a housekeeper who was sort of girl of all work, (Rec. p. 562), and he treated her as one of his family as long as he could put up with her ways, (See Record of his letter, p. 597), and until some time after.

In August, 1905, after plaintiff and her boys had been living in California for some time, she married one Edwin J. Price, the only son of a dry goods merchant in San Jose, California; he lived eight years longer than Mr. Smith and died in 1914.

The Pretended Issues.

Counsel challenges the findings and decree of the court below upon four alleged errors:

1. Dismissing plaintiff's bill.
2. Denying the relief of her prayer.
3. Refusal to admit in evidence a letter, Exhibit F, in private correspondence wholly between outside parties and with no authority from the defendant.
4. Refusal to receive an inventory of Mr. Smith's estate until such time, if any, as an accounting should be found proper.

The first two alleged errors are supposed to raise the point that the court should have found for plaintiff and given the relief for which she asked, instead of for the defendant. The second two will be treated in their order.

As We See the Issues.

But, as we view the situation, if the court considers the alleged merits, there is a preliminary question of both fact and law, namely:

Does the Minnesota Judgment Preclude This Case?

We therefore feel that a compliance with Rule 24 of all circuits (150 Fed. XXXIII), has not been followed, but we are left in that uncertain position that requires us for safety to present both facts and law, if *this Court* shall compel us to treat the case as if there had been a proper Assignment

of Errors, but at the disadvantage of having no definite points to controvert, and the chance that the court may not have proper light upon the right questions.

Under the facts the decree was undoubtedly correct and should be supported as against appeal upon the following principles:

1. That this whole matter has been concluded by the Minnesota decision on the facts and the law given hereafter.

2. That there never was any arrangement in fact such as plaintiff claims with Mr. Smith or defendant, and that she got from him and his estate all that he ever expected her to get, and that further claim upon him and defendant was entirely an after-thought which did not comply with either the law or equity of Minnesota or of this jurisdiction.

3. That the decree was right in principle and amply supported, in fact compelled, by the evidence in this case, as well as the law.

4. That the alleged errors of rejection of evidence are not meritorious.

In this order we shall state the facts with some argument interposed as to plaintiff's claim.

But it is at once observable that these are but general statements as we have not been challenged to particular errors, but blinded by supposed segregated decisions in Appellants' Brief, as illustrated at page 73-83.

THE TEST.

As said by this court in *Migeon v. Montana Cent. Ry. Co.*, 77 Fed. 249-252:

"In the consideration of such specifications of error the general rule is that, in equity suits tried before the judge without a jury, the appellate court ought not to reverse the case merely upon the ground that the judge received irrelevant testimony, or that he rejected testimony that was admissible, where, upon all the facts and circumstances of the case, it is clearly apparent that the

result would not have been different if the testimony objected to had been rejected in the one case or received in the other. *Bank v. Greenhood* (Mont.) 41 Pac. 251, 267, and authorities there cited; *Scroggin v. Johnston*, 45 Neb. 714, 64 N. W. 236, 238, and authorities there cited; *Holmes v. State* (Ala.) 18 South. 529. The controlling inquiry in such cases is whether there is sufficient competent evidence in the record to sustain the decree. *Grayson v. Lynch*, 163 U. S. 468, 476, 16 Sup. Ct. 1064, 1067. In *Mammoth Min. Co. v. Salt Lake Foundry & Mach. Co.*, 151 U. S. 447, 451, 14 Sup. Ct. 384, 386, the court, in considering assignments of error in the admission of evidence, after quoting the language of the territorial court that: 'These errors are not available in a case in equity, for the chancellor is supposed only to act on proper evidence.'"

No change in result.

Result—*Williams v. Breitling Metal-Ware Mfg. Co.*, 77 Fed. 287 (C. C. A.).

Engelstad v. Dufresne, 116 Fed. 582.

I.

IDENTITY OF CAUSES OF ACTION IN BOTH CASES.

The issues in this case involve the merits of the same transaction decided adversely to plaintiff on demurrer, in the Minnesota case as is conclusively shown by the Judgment Roll and the evidence of that case and the pleadings in this case.

See Judgment Roll Record pp. 48-93; Evidence of W. A. Lancaster, Rec. p. 572-82; Pleadings in this case p. 2-43; Court's opinion in this case, Rec. p. 94.

In the case brought in which a demurrer was sustained to the complaint in the Hennepin County District Court, Minnesota, an exemplified copy of the Judgment Roll, in which is attached to the answer herein, and in this case the gravamen of the respective charges is in substance the same, although there is a slight amplification of detail and one or two slight variations as to dates; but in each case the same issue, the same evidence, the same causes of action,

the same parties cannot be disputed as will appear from the respective similarities following:

a.

In the first complaint, paragraphs 1, 2 and 3 (Rec. pp. 49-50), in effect, sets out that the plaintiff was 29 years of age and the only child of Lyman Ailes and Lillie D. Ailes, who were divorced prior to the 12th day of July, 1893; that Mrs. Ailes, on the 12th day of July, married Peter B. Smith, and lived with him until her death; that from the time of that marriage and until the marriage of the plaintiff with Donald Maclean, she lived with her mother and step-father as a member of the family and at the request of them abandoned her name of Ailes and adopted that of Smith; that while she was living with them she

“was loved, cherished, cared for, provided for, reared, educated and treated in all respects by her mother as daughter ought to be treated, and by her step-father in all respects as if she, said plaintiff, were the natural daughter of said Peter B. Smith, and as a daughter should be treated by her father.”

In the complaint in this court (Rec. p. 2-24), approximately six years afterwards, we find that she simply adds six years to her age, and that the other allegations as contained in paragraphs 3, 4 and 5 cover the same grounds as those in the first complaint, with a few additional amplifications thrown in by way of inducement intended to indicate that Mr. Smith had brought the plaintiff up to a life of luxury, *and this complaint is so worded as to try to avoid the fact that she had been properly educated, as is evident from the allegations of the first complaint.*

It is evident that there is no dissimilarity upon these allegations such as would distinguish one case from the other in the line of evidence or the proof or anything of that sort; nor is there any reason why the first case should not have been shown, so far as material, without these added

allegations. None of them go to the question as to whether or not there was a contract. They only go to the attempt to show some additional reasons to try to make the alleged contract probable.

b.

In the first complaint (Rec. p. 50), it is alleged that plaintiff married Donald MacLean on 20th of February, 1899; that on the 8th day of January, 1902, she was divorced from him; that on the 21st day of August, 1905, she married Edwin J. Price, and that they were still husband and wife at the time that action was brought; that there were two sons as an issue of the first marriage, Donald, Jr., born March 8, 1900, who was then eight years old, and Robert Maclean, born July 9, 1901, who was then seven years old.

In the present complaint (Rec. p. 5), in paragraph 6, she pleads that she married Mr. Maclean on the same date in London where she had gone for a visit, with the knowledge and approval of Peter B. Smith; that of said marriage there were two children, Donald, Jr., born at Honolulu, March 8, 1900, and Robert Maclean, born at Minneapolis, July 8, 1901.

It is evident that these are the same allegations; but the second complaint was so worded that a casual glance might indicate that Mr. Smith consented to the marriage or that at least he consented to her going to Europe at the time she married Maclean. This, of course, is a forced attempt to cast a little more responsibility upon Mr. Smith, for all of the acts which the plaintiff performed, but there is no difference in the evidence, no difference in the allegation, no difference in the complaint which could cause any variation; besides, these things do not go to the gravamen of the charge, but rather go to show that she herself knows that it would not have been carried out by herself, if such arrangement had been made.

There is nothing, therefore, in this element of the sec-

ond complaint which could prevent the binding effect of the former judgment.

c.

In the first complaint in paragraph 5 (Rec. p. 51), the plaintiff pleads in effect that in or about the month of October, 1900, she was living in the house and home of Peter B. Smith and he contracted with her in effect that she should remain and live with him during the remainder of his life in his house and home and treat and regard him as if he were her natural father, and love and care for him as a natural daughter ought to do, and keep her son, Donald, with them during the remainder of Peter B. Smith's life-time, and to take up and assume all of the cares, duties and responsibilities of a housekeeper for said Peter B. Smith during the remainder of his life; to be mistress of his house and home, and do all things in that connection required of her by him during his life; that he would support them as if she were his daughter, including a promise to love her as if she were his daughter and to love Donald as though he were the grandson; that he would furnish and provide a home for her and Donald with himself during the remainder of his life and provide and satisfy all of their wants and necessities, treat and regard them as though she was his own and natural daughter for and during the remainder of his life-time, and regard the boy as if he were a grandson, and that he would give, devise and bequeath to the plaintiff, at his death, the whole of the estate of which he should die possessed, and that by his last will and testament he would make the plaintiff his sole and only heir, devisee and legatee.

In the second complaint (Rec. p. 5), paragraph 6, again trying to get further inducement, she sets out where Dr. Maclean was stationed after he was married to her, and that when her mother took sick she returned to Minneapolis and helped nurse her (as if that were unusual for a

daughter); that she rejoined her husband in Honolulu and that Mr. Smith and her mother visited Honolulu, while her mother was ill from cancer; that they afterwards returned to Minneapolis and kept up a correspondence with her and that Mr. Smith urged Maclean to resign from the army and come on to Minneapolis, to be with them, in the hope that it would prolong the mother's life; that accordingly Maclean did resign, and that he made certain remarks about being much attached to her and the son while they were in Minneapolis, and while he was in a state of depression; it then sets forth that in October, 1900, Dr. Maclean had become dissipated and became involved in some affair, the particulars of which were never known to her, but that he left hurriedly; that she was ignorant of his whereabouts, but is now informed that he went to Mexico and finally to Nevada and married again and has built up a medical practice; that at the time when Dr. Maclean was in this difficulty in October, 1900, and was about to depart, she wanted to go with him and take Donald; that she was then pregnant with the second child which was born on July 6, 1901; that Maclean and Smith advised and urged her that she remain at Mr. Smith's house; that Mr. Smith then told her that Maclean was not a fit man for her to go away with and that she should give up all thought of ever living with him again, and advised her to bring a divorce action which she brought, and obtained a divorce in the courts at Minneapolis; that at and after the time when Maclean left they agreed that if she would remain at his home with her son Donald, and such other children as might be born to her (of course she could not then know that another would be born) and treat and regard him as her own father, care for him in his declining years, manage his household, be his housekeeper as if she was his daughter, he would care for and support her and her children as if she were his daughter, and her children

his grandchildren and at his death he would leave to her for herself and her children all the property which he might then own, but that if she refused to do as he advised and urged and went with or followed Maclean, that Mr. Smith would cast her and her children off and leave none of his property to them; that she had great confidence in him and respect for him and believed that what he told her was true and accepted the proposal and agreed to carry out the transaction.

There is no particular fact in connection with these alleged agreements in this case which could not have been proven in the other case, and indeed, it is doubtful if as much could be proven in this case as under the former complaint.

d.

In paragraph 6 of the first complaint (Rec. p. 53), it is alleged that pursuant to the agreement, the plaintiff entered upon the performance thereof and continued thereon until a short time after the marriage of said Smith and the defendant; that Smith, himself, pursuant to the agreement, performed it until a short time after his marriage with the defendant, which in the first complaint, she alleges, was in the month of June, 1902. *In this complaint in the 10th paragraph*, she alleges that in October, 1900, and pursuant to the agreement immediately thereafter, they entered into the performance of that agreement and that he introduced her as his daughter to some of his friends and called the boy his grandson, and that they both continued to perform that agreement until the modification thereof.

Of course there is nothing different in this.

In the 8th paragraph of the first complaint (Rec. p. 54), it is alleged that shortly after the marriage between Mr. Smith and the defendant that Mr. Smith *dismissed and discharged* her from her position of housekeeper and mistress of his home and installed the defendant therein, and that

thereupon they mutually modified their contract with the consent of the parties hereto, including Mrs. Smith, to the following effect:

That the plaintiff would release the agreement formerly pending so far as it related to furnishing and providing a house and home for her and her son, Donald, with him, and from his promise to keep and maintain the plaintiff as his housekeeper and the mistress of his home, and from his promise to give and bequeath to her his whole entire estate at the date of his death, and from his promises to make her his sole and only heir, devisee and legatee, and that she could go wherever she pleased, reside where she pleased, do whatever she wished to do, take her children wherever she might go if she desired to do so, and to support and maintain said plaintiff and her son as long as he lived, providing her with such sums of money as would be necessary and give, devise and bequeath at his death, to the plaintiff, one-third of his whole and entire estate for herself and an additional one-third of the whole and entire estate to her for the use and benefit of her two sons.

It is evident from this complaint that the basis of that complaint, so far as his estate was concerned, was a charge based upon this alleged modified contract for an agreement without any future performance upon her part, or the part of her children, to will two-thirds of his estate to them, and consequently there could not be any particular performance on their part to that agreement, for there was nothing for them to perform.

In the present action (Rec. p. 11), she alleges that in or about February, 1902, he informed her that he desired to marry the defendant and proposed to the plaintiff that she would be relieved, after his marriage, of the services which she was to perform under that agreement and have greater liberty for herself to travel, etc., as she pleased; that he would pay for the expenses; that they then agreed

to modify the agreement of October, 1900; that he would convey the one-third to her for her own use, one-third to her for the boys, and be permitted to convey one-third to the defendant whom he then proposed to marry, and that the contract was accordingly modified to that extent, and in consideration thereof, they proceeded under that contract; but there is nothing alleged as to anything that she has done since that modification which could lay any basis for specific performance. She does allege that in February, 1902, he stated the agreement to the defendant and she consented to it.

The only change in substance in this allegation is that it occurred before the marriage with the defendant, while it is alleged in the other case to have been immediately after. But this does not vary the nature of the claim.

f.

In the first case (Rec. p. 55), it is alleged in the 9th paragraph that on the 10th of January, 1906, the deceased, by his last will and testament, devised and bequeathed all of his property to the defendant and appointed her as the sole and only executrix of his will, and that on the 16th day of August, 1907, he died.

In the present case (Rec. p. 15), it is alleged in paragraph 15 that the deceased owned no real estate; that he made his will on January 10, 1906, wherein he bequeathed all of his property to the defendant and appointed her the sole executrix, and that he died on the 16th day of August, 1907, and a petition for probate was made on the 27th of the same month.

There is no variance in this record.

g.

In the first case (Rec. p. 56), it is alleged that on the 27th day of August the petition of probate was made, and that on the 23rd of September the will was admitted to probate and letters testamentary granted to the defendant, and

that the estate was wound up on the 12th of March, 1908.

In the present case (Rec. p. 15), in paragraph 16, it is alleged in substance that the estate was turned over under decree of distribution to the defendant; so that there is no particular variance in this.

h.

In the first complaint (Rec. p. 57), in paragraph 11, it is set out that Peter B. Smith owned certain property which is specifically mentioned, and which the complaint says is of greater value than the sum at which it was appraised, and that that was not all of the property.

A similar allegation appears in the present complaint (Rec. p. 19), in paragraph 17, wherein she alleges that the property must have been worth \$150,000.

In fact, the first complaint had the same allegation, and the further allegation that it was worth in the whole \$250,000, so that the estate, according to the second complaint, was worth less; the same evidence of course would have to be presented on the two of them.

i.

In paragraph 12 of the first complaint (Rec. p. 59), it is alleged that prior to the death of Peter B. Smith, he and the defendant entered into an agreement and understanding wherein and whereby it was agreed that he should devise all of his property to her, and that after his estate had been fully wound up under his will, the defendant would give and assign to the plaintiff for her use and benefit one-third of the property, and should give and assign to her for the use and benefit of her sons an additional one-third out of the estate.

It is also alleged in the 13th paragraph that the defendant knew all of these things, and that in or about the month of September, 1907, while the estate was being administered, plaintiff stated the substance of the alleged contract, and the alleged, modified contract to the defendant and

stated that the plaintiff intended to take action to enforce her claims; that defendant knew all about these things, and then stated to her that that had been arranged between her and said Peter B. Smith during his life-time, and that after the estate was wound up she would turn over his property, and that plaintiff need do nothing to carry out the matter in any court while the estate was being probated.

In the second action in paragraph 16 (Rec. p. 15) the same allegations in substance are made except that it is alleged to have been before the petition to probate, and it is alleged that she believed and relied upon them and did not take any steps accordingly, but that same allegation is contained in the first cause of action, so that there is no variation in this.

j.

In the first complaint, in the fourteenth paragraph (Rec. p. 62), the matter of the amount of property and value as appraised is set forth and it is alleged that after the defendant got all of the property she refused to execute the trust created by Peter B. Smith and refused to give or convey the property to plaintiff for the benefit of either of the alleged trusts, after the demand.

In the present case (Rec. p. 21), paragraph 18 sets forth in substance the same thing with slight variance so that with a few amplifications as to details and no substantial variations as to substance, the second complaint is the same as the first down to the prayer.

k.

THE PRAYER.

In the first complaint (Rec. p. 63), the defendant asks first for an accounting and in the second complaint she asks for that also.

In the first complaint (Rec. p. 63), she asks that the

defendant be decreed a trustee of all of the property of which Peter B. Smith died possessed.

In the second complaint (Rec. p. 22), she asks in a little different language that the plaintiff be decreed a trustee as of a two-thirds interest in the property, and that it be turned over to the defendant as the beneficial owner and in trust.

In the third place, and in the first complaint, the plaintiff asked that two-thirds of the property be decreed to be held in trust, and in the last complaint she asks for an accounting for those trusts.

In the fourth place, the court is asked to adjudge the value of the property of which said deceased died possessed, and also in the other sub-divisions she asked for an appraisal of the property and the profits and for a division thereof for the purpose of the alleged trust with a clause for general equitable relief.

In the last cause, they ask that the property be turned over to the plaintiff or to such new trustee as may be appointed by the court and for general equitable relief.

So that in substance and effect there is absolutely nothing in the second action which could possibly make any cause of action out of the complaint which did not state a cause of action in the first instance. The parties; the causes; the whole alleged gravamen are the same.

A demurrer upon four grounds was introduced, including the ground of want of a cause of action (Rec. p. 69). It was argued upon that ground (Rec. p. 575) with the admission that the alleged contracts were oral (Rec. pp. 574-5), and sustained by order (Rec. p. 70). An appeal was taken to the Supreme Court and dismissed (Rec. pp. 75-80) after our repeated efforts to get her to prosecute it if she desired to do so (Rec. pp. 78-9), and plaintiff was about to let the time to amend go by (Rec. p. 81), when the court refused to extend the time which had been originally granted (Rec.

p. 70), and no attempt was made to amend, because, as shown by this action, they had no further theory upon which they could replead, and a judgment was entered sustaining that demurrer which is the usual method in Minnesota (Rec. pp. 90-92).

II.

There Was No Agreement with Mr. Smith or with Defendant.

In spite of all the investigation we could make, there was not a scintilla of evidence we could discover, even looking toward a meritorious claim of plaintiff prior to the trial. This led us to believe that she would either never push her case, or come into court with a story intended to be so constructed as to be based upon events where there was no outside witness, and consequently claims that she hoped could not be overcome by facts that could be found.

She could not push such a case with any hope of success in Minnesota without evidence other than alleged conversations with the deceased for that state has the following statute:

“Conversation with deceased or insane person—it shall not be competent for any person to an action, or any person interested in the event thereof, to give evidence therein of or concerning any conversation with, or admission of, a deceased or insane party or persons relative to any matter at issue between the parties, unless the testimony of such deceased or insane person concerning such conversation or admission, given before his death or insanity, has been preserved, and can be produced in evidence by the opposite party, and then only in respect to the conversation or admission to which such testimony relates.” Rev. Laws of Minn. §4663.

The plaintiff, for some reason, evidently believed it necessary to so construct her story as to make it appear:

1. That Mr. Smith took her in as a fourteen-year-old girl and loved and cherished her and he was leaning upon her and her children for aid and comfort for loss of her mother after he had loved and won the defendant as his

subsequent wife (Appellant's Brief, p. 5); instead of revealing to the court the plain and simple fact that Mr. Smith married her mother and took in, and cared for, her mother's child until she went to travel with and marry in the presence of her own father (Rec. 245-46); that he allowed her liberal treatment as a member of his family while she stayed (Rec. 217); that he subsequently took her in, and gave aid to her and her husband and children (Rec. p. 253) till after the dissipations drove the husband from his home (Rec. pp. 517, 521), and plaintiff's treatment of Mr. Smith reached a point where her conduct and treatment toward him caused him to tell his neighbors in tears (Rec. pp. 518-545) of her cruel wounds to him and his determination to stop doing for her (Rec. p. 517), when he appealed to her own flesh and blood to take her away and even offered to help stand the expense (Rec. p. 591), and did help her own father with her expense till she again married and had a husband to support her and her children, when he aided in buying them a home (Rec. p. 527), cut out such provisions as he had in his previous will for them (Rec. p. 585), and quit any regular aid toward them (Rec. p. 517). He had helped them to the point where he felt entirely released from further care, or further protection, except that he left as a final request the note of defendant and husband which he held against their home (Rec. p. 291).

In short, that he was a generous man who had this family thrust upon him by a disappointed marriage with no very satisfactory way to turn them loose even upon their own relatives, and naturally loved the children; but when a subsequent marriage of plaintiff enabled him to aid them in a new home and spend the most of the \$10,000 he once intended them to have, he changed his will to leave his property to his wife who had helped to accumulate all above \$40,000 (Rec. p. 470) and whom he had chosen to prefer to love and protect.

2. That he agreed to give all of his property to her and her two children and subsequently modified it to two-thirds (Rec. p. 213), to which defendant agreed (Rec. pp. 211); but of this there is no corroboration whatever; the unreasonableness of it is made clear from various undisputed facts; Mr. Smith's own conduct disputes it; every living witness to any portion of her tale is against her, and it is inequitable for her to thus loot a dead man's estate as against a widow whose good faith is not entitled to be questioned by any argument where reason has not run mad with envy.

Let us therefore proceed to examine these matters in detail as they are, and not as plaintiff would now claim them with visionary hope, and we find that the decision of the learned *trial court* is far from doubtful and not entitled to the sort of criticism found on p. 20 of Appellant's Brief.

1. As to the disposition of Mr. Smith toward the plaintiff, and her two boys as well, as they come into and departed from the scheme, we notice that there were the following periods:

a. The period from the marriage of Mr. Smith to her mother in 1893, till she went to travel and marry under the tutelage of her own father, Mr. Ailes.

b. The period from her European marriage till she came back to pay her last respects to her sick mother.

c. The period from the death of Mr. Smith's wife, when he gave them shelter in his own home, as long as he could stand her.

d. His attempt to get her under the care of her own people till Mr. Smith's death and the distribution of his estate.

a. Relations of plaintiff to Mr. Smith from his marriage to her mother until she left his home and went with her own father, Mr. Ailes, to, and married in, London, England.

The complaint in question was not founded upon the theory or fact of adoption as will appear upon its face

The question was raised during the trial as to whether there was any intention to claim actual adoption and the attention of the court was called to the fact that a stipulation had been filed allowing the plaintiff to amend her bill to make such claim if she desired to undertake to prove it and that she did not make that amendment and that there was no issue upon it (Rec. pp. 167-169). And the court notified us to confine ourselves to the contract (Rec. p. 168); but allowed the plaintiff to go into the story which she wanted to tell about her treatment by Mr. Smith when her mother was first married to him, with a view of showing the relations between them, without attempting to make any liability outside of the contract (Rec. p. 169), upon the theory that they should stand or fall by their complaint on the alleged contract.

No claim was made by plaintiff of any acquaintance with defendant until long after the first and second periods which we have mentioned, nor does she designate any claim based upon any alleged contract prior to her marriage with Dr. MacLean; but upon the contrary we asked her:

“Q. There was no promise upon the part of Mr. Smith at the time you married Dr. McLean to make any contribution to you to support you and Dr. McLean, was there?

A. No.

Q. Nothing of that kind was brought up, was it?

A. No.” (Record, pages 246-7.)

The plaintiff claims, as we understand, that Mr. Smith treated her as a member of his family until he surrendered her to her own father at the time when she went, at the expense of her father (Rec., p. 178) to London, England, where

“she married Dr. McLean before her return to this country and without Mr. Smith or her mother ever seeing or knowing Dr. MacLean.”

We have made no claim at any stage of this case but that Mr. Smith was a generous man and that notwithstanding

ing the fact that the plaintiff had a father of her own, able to take her upon European jaunts as she says "he did" (Rec., p. 178), yet Mr. Smith treated her as well as a step-father could treat the daughter of the woman he married, and was as kind and generous to her as her conduct warranted while she lived at his home and the trial court so concluded as is evidenced by its opinion (Rec., p. 96), 221 Fed., p. 576.

The plaintiff had evidently concocted her story upon the theory that she could make a great impression upon the court, as to this particular period, by claiming that Mr. Smith told her the morning after his marriage to her mother, when she undertook to call him uncle, that she was to be his little girl and her name was to be Bessie Smith instead of Bessie Ailes from that time—she was then fourteen years old (Rec., pp. 170-171), (and presumably not small or weak-minded as will later appear), and that she used the name Smith at different times and under different circumstances; but on cross questions (Rec., p. 177), she admitted that she called her own father "Papa Ailes" and Mr. Smith, "Dad."

She undertook to say, in that connection, that Mr. Smith did not want her to go with her father to Europe (Rec., pp. 177-178), but that she was then nineteen years old and had finished her education and went to New York alone. She thought at Mr. Smith's expense, and met her father at New York, and on direct examination continued that this was in January, 1899; that she went to London at her father's expense with no other companion except her father; was married in London the next month to Dr. MacLean, whom she had met on the boat going over (Rec., pp. 178-9), and had become engaged to him "subject to my Dad's and my Mother's approval" (Rec., p. 180); but when she came to cross examination she admitted that her own father was at the wedding, (Rec., p. 245).

"Q. Did you ask his consent to the marriage?

A. I do not know if I asked his consent. I simply told him I was going to be married."

(Rec., p. 246.) (Weak-minded creature?)

Following that admission she admitted that she cabled back to her stepfather for money without telling him that she expected to marry, although she was planning to marry later, as she claimed, at her home, and had cabled for money to come home. (Rec., p. 246.) She denied that she had married before she had cabled for money, (Rec., p. 246); but she admitted, with much hesitation (Rec., p. 248) that instead of asking her mother and her stepfather for consent she had done as she did with her own father, told them that she had met Dr. MacLean and expected to marry him and hoped that they would not object. (The loving and obedient daughter and stepdaughter?)

She admitted that she told the wife of Mr. Smith's nephew, who was much at the house after she had her trouble with her husband, (Rec., p. 280), that Mr. Smith had wanted to adopt her at one time, as Mrs. Jessie Carey Smith, the wife of the nephew had testified, and that she and her mother had declined to allow him to do so for fear that they would lose such mining interests as she was entitled to inherit from her own father, from his Alaska ventures (Rec., pp. 283-84).

To sum up this period, then, plaintiff had started out with the claim that Mr. Smith had meant to treat her as his own daughter and have her change her own name and had supported her liberally—the money sometimes coming through her own mother (Rec., p. 249); but that she grew up to be nineteen and was offered by her father to be allowed to travel in Europe at his expense and under his name. She went and simply told father, mother and stepfather (who had generously treated her) that she had made up her mind to be married and that she had declined, as

shown long thereafter, to become the adopted daughter of Mr. Smith.

b. The period from her marriage to Dr. MacLean in London until the death of her mother.

After she was married to Dr. MacLean in London and with no promise on the part of Mr. Smith, as she states (Rec., p. 246), to support them, she went with Dr. MacLean, who was an army surgeon in the United States army, around to various points where he was stationed in the army (Rec., p. 247). While she was married to Dr. MacLean and stationed at Honolulu, Mr. Smith and her mother visited them. Her mother was suffering from cancer and wanted to go over to see her she thought, more than she did for her health and tried to work in, in that connection, that Mr. Smith wanted to go also, (Rec., p. 250). Mr. Smith or her mother had never been to Honolulu before, (Rec., p. 251).

It is therefore evident that during this period there was nothing in which there was any unusual service or love or consideration or promise or agreement between these parties for any such unnatural contract as plaintiff claims.

c. The period when Mr. Smith gave shelter to the plaintiff as his housekeeper and her husband and the oldest boy, and subsequently to the second boy, from the death of plaintiff's mother till her conduct forced him to send her away; also their relations thereafter till his estate was distributed.

Plaintiff did not like to admit but finally had to admit, (Rec., pp. 251-2), that after Dr. MacLean had resigned from the army and had come on to Minneapolis with her that she and Mr. Smith and the Doctor talked over the question of his starting in private practice and that it was finally understood by all of them that he would undertake to establish a practice. She did not like to admit the cold fact that Mr. Smith had told them that if they wanted to stay there and allow Dr. MacLean to attempt to establish a med-

ical practice in Minneapolis that Mr. Smith would employ the plaintiff as his housekeeper and pay enough for her and the family to live on there with him and let Dr. MacLean have everything he could earn upon which to start his medical practice; but preferred to put it in a different way to make it appear that Mr. Smith had insisted upon their staying instead of telling them, "if they wanted to stay."

She admitted that the household expenses were to be paid and that the doctor was to start his practice and said she did not think there was any time limit placed on that matter, (Rec., p. 253.) In order to set her right upon the facts, we started in, (Rec., p. 254), to refresh her memory as to the fact that she and Peter B. Smith both gave evidence in her divorce proceedings, which was tried in the spring of 1902, upon a complaint filed in the year 1901, but her memory was very poor about the evidence that was given in that trial, (Rec., pp. 254-55), and when the allegation in her own divorce complaint which did not have the limit of time as to the arrangement of Mr. Smith, but told of the arrangement, was read to her, (Rec., pp. 255-6), she said:

"It sounds rather familiar; but as I say, I never read the whole thing,"

and her attention was called (Rec., p. 256), to the minutes and evidence of the clerk of court, (Rec., p. 256), to show that she and Mr. Smith alone gave testimony in that case and the court admitted Exhibit "I," which was the complaint in the divorce case, (Rec., p. 256) in evidence, together with the judgment roll.

We then called her attention to the fact that the findings of the court in that divorce case in which she and Mr. Smith alone had given evidence were to the effect that she and her husband had gone to live with Peter B. Smith in June, 1900, for *one year* from that date, to be supported by him without expense to the defendant, who was to engage in the

practice of medicine and surgery and have all of the income which he could make during that time, (Rec., p. 257). She side-stepped the knowledge of this arrangement as to limit of time and undertook to explain that possibly she was not told of it, but admitted that at the time when that action was pending on the 8th of January, 1902, when these findings were made, she was residing in the home of Peter B. Smith, acting as his housekeeper, and that in addition, he had a maid known as Emily Carlson, who did the general work and was quite competent and sometimes did the ordering for the table, as the plaintiff herself was not accustomed to taking part in housekeeping.

“Q. You had not been accustomed to keeping house in your mother’s lifetime? A. No.

“Q. You were not accustomed to planning meals? A. No. (Rec., p. 257.)

The complaint in this case charges that the alleged agreement with Mr. Smith, for love, affection, etc., was made in October, 1900, (Rec., p. 90, par. 9), which of course takes no account of the fact that she was then in the employ of Mr. Smith under a contract that had not expired, at a smaller consideration and of which she offers no explanation except a forgetful memory. This finding of the contract is evidently the result of Mr. Smith’s testimony and her own as well, long after she now claims the contract to will the property, was made. If either of them had ever heard of anything of that kind it would have gone into that decision—we could not locate any stenographic notes.

She claims, in her complaint, (Rec., pp. 9-15), that she had an agreement with Mr. Smith that if she would remain in his home with her son Donald and *such other children* as might be born of her pregnancy and treat and be treated as a daughter and grandchildren, respectively, that he would care for them as his own child and grandchildren and leave to her for herself and the children all the property which he might own at the time of his death, (Com-

plaint, Rec., p. 9). Her story upon this matter on direct examination is found at pages 211-213, wherein she undertakes to tell us that in June, shortly after the mother's death, (Rec., p. 190), it was decided between her and Mr. Smith and Dr. MacLean that she would stay there with Dr. MacLean and the baby and keep house for Mr. Smith. She tried to work in that her stepfather had insisted on her coming on to see her mother and she had insisted in her original story that this arrangement in June was to be a permanent arrangement.

"Q. Was the conversation that you had about you and the doctor staying there permanently with Mr. Smith?

A. Yes; that he had resigned, and he was to take up private practice in Minneapolis, and we were to live there." (Rec. pp. 190-191).

She then worked in that Mr. Smith was very fond of the baby. She then gives evidence to the effect, for her own counsel, that the relations between Mr. Smith and the Doctor were very cordial; but that later Mr. Smith objected to the Doctor's habits and they had much friction, (Rec., p. 192).

She had evidently forgotten, in connection with this original arrangement, that it was of the kind which the Minnesota court found at the divorce case and she continues upon her direct examination before discovering it, (Rec., p. 193), that Mr. Smith insisted that Dr. MacLean leave the city and refused to let her go with him while he had no home and no way to care for her, and she had no ticket to leave on, and that he said that she was his daughter and must stay with him; that she insisted upon going with the doctor until the last moment, but that Mr. Smith took the baby out of her arms and told her that if she was so foolish as to go with that sort of a man that she could not take the baby; that she stayed as the result, and the Doctor went and she remained with Mr. Smith until he married the defendant, (Rec., pp. 193-4).

Having thus, as she supposed, fixed a proper setting for her story, she tells us, beginning on page 195 of the Record, that when she was getting the baby ready for bed on the following evening, Mr. Smith came to the nursery and told her that she ought to be glad to be rid of such a man, as he would never be able to take care of her or the baby, but that she was Mr. Smith's daughter, and that her duty was to her father and to her baby and to keep up the home and look after Mr. Smith, and that if she would consent to leave the Doctor—divorce him—the better it would be for her. She then says that he was walking up and down with his hands behind his back and said that "if I would give him up entirely that everything he had would be mine when he had gone." She says that she told him that she thought the Doctor would be able to take care of her soon and would not give him up, (Rec., p. 196). She tells us, on page 197, that he kept asking her if she was going to give up the man and that she was pregnant with her second child, and that state of affairs continued until the fall, and finally, in April or May, 1901, she said to Mr. Smith: "All right, go ahead and get the divorce. He did. And then I accepted." The divorce was granted in January, 1902, (Rec. p. 256), and he was married to defendant in May, 1902, (Rec., p. 194) (Still arguing that her duty to him was greater than to her husband?)

Counsel tried to lead her on a little, (Rec., p. 198); but the court would not allow it and she proceeded to tell us what she did for Mr. Smith. After this alleged conversation:

"Q. What your status was in the house?

A. Why, I didn't do any housework, the manual part of it, at all. I simply decided what the meals were to be, and what was necessary for the house. I had a maid, whom my mother had trained, who then became housekeeper, the working housekeeper of the house. I had none of those duties.

Court: You managed the affairs of the house as your mother had prior to that time?

A. Well, yes, in as far as I could; but my mother had trained Emily; that was our maid. After that I went on as far as I could, as my mother had done." (Rec. pp. 200-201).

His fortune for such housekeeping?

Her story of the alleged contract was that given on pages 193-198 and the burden of her story there is that she wanted to go with the doctor when he left and Mr. Smith took the baby and said that he would keep it, and that she ought to be glad that she was getting rid of such a man and that her duties were to Mr. Smith as her father and to the baby, and that the sooner she consented to leave the doctor and divorce him, the better it would be for all of them. On cross-examination she admitted that she had no money to go with the doctor at that time, and of course no reasonable man would let her go off with a man who was running away, and take a baby, if he had to contribute money for her to go. The fact was she had no way of going. She tells us on page 197 that he again asked her if she was going to give up Donald and repeated it over and over again, and told her that when she did that everything he had would be theirs. Finally, she says that in April or May, 1901, she could not stand it any longer and she said, "Dad, all right, go ahead and get the divorce." She tells us on page 212 that Mr. Smith told her of the engagement and that of course nobody else could take her mother's place; that he needed a companion; that she was young and needed her friends, and more freedom; and that instead of all, she would have one-third, the boys would have one-third and the wife would have one-third, but that he had enough for all. I said.

"All right, and then we went to breakfast."

This, she claims, was the morning after the engagement. She tells us that on the previous night and after the engagement, the defendant was at their house, and she gives the account in this way:

"And owing to our lack of room, Mrs. Wallace was rooming with me—shared my room. She wakened me, if I had been asleep—anyhow I was awake. She came to bed. She took me on her arm and told me that my Dad had asked her to be his wife. She furthermore said that she knew how fond I was of Dad and how fond he was of me and the children, and that she would never interfere with us in any way nor come between me and my Dad. We had a long talk, and she said that I was young—I was too young to have the responsibility of having the house and taking care of the house, with the maids, with the babies; that she thought it was too bad that I had married so young—that I had never had a young ladyhood—that I had simply jumped from girlhood to womanhood; and when she married Dad and came into the house that I would have much more freedom and time to enjoy myself. I was very fond of her. I thought myself—I was glad at anything that would make Dad happy—I was glad; and when she was so nice about it, saying that she knew how close the relationship was between my Dad and myself and my babies, and that she would never interfere, why, I think I told her how glad I was in a way; that naturally it seemed odd to have anyone take mother's place, but that it was all—I was glad.

Q. Now, that was about all of the talk?

A. That was about all.

(Rec. pp. 211-12.)

She then tells us on page 229 that after the funeral she tried to have a conversation with the defendant at the defendant's house, but could not find any favorable opportunity, but one day they had a talk when they were alone on the porch and at that time the plaintiff knew the contents of the will. She had gone to the courthouse with her husband and looked it up, (Rec. p. 230). She said that she told the defendant that she had seen the will and was surprised that there was no provision for her and the children, and could not understand it, and the defendant said that she was surprised also and that she knew nothing about it, and supposed it had been made that way—it was short and very brief for business reasons, and that the defendant sup-

posed that the plaintiff was anxious to get back to her children, and

“* * * that she knew the agreement, and that I could go back to California, and not wait for the will to be probated.

Court: What agreement?

A. Well, I presumed that she meant the agreement between my Dad and I that I was to have one-third and the boys were to have one-third. I took it to mean that, because I was speaking about the will, and said I was surprised that no mention had been made of us, or me. And that I could go back to California, back to Mill Valley, and she would send our share to us. That was all the conversation.

Court: Did this will provide anything for you or your children?

A. Not mentioned in any way.

Court: You were not mentioned in the last will?

A. Not mentioned. And I spoke of how surprised I was.”

(Rec. p. 231.)

In other words, the gist of her story is not that she was to render aid and comfort and love and affection to Mr. Smith, but that if she would divorce her husband who was apparently no good at that time, and remain there and look after Mr. Smith, he would give her his property, and there was nothing very definite about her method of acceptance; but she assumed that she was accepting that proposition when she would get the divorce. In other words, she claims that this matter was suggested to her a number of times from the time her husband left and that finally, when nothing very definite about it was said, she said:

“All right, Dad, go ahead.”

And she supposed it meant that she would get the property and that she thought possibly Jessie Carey Smith was present at the time. As it will be observed later, Jessie Carey Smith testified that she never heard of any such thing, as every witness did, who was implicated in any connection with the alleged agreement.

The gist of her story respecting why Mr. Price was sent

away and the alleged contract as a consideration for sending him away was as follows in cross-examination:

"Court: Was he in disgrace?

A. Why, yes.

Q. And he was threatened with prosecution, wasn't he, at that time?

A. Well, not publicly threatened.

Q. But privately? Privately threatened with public prosecution, wasn't he?

A. Well, I think that would be what Dad's words were.

Q. Now, after Dr. MacLean left Minneapolis, you expected to go to him for something like a year, didn't you?

A. Nearly that, yes.

Q. You kept in correspondence with him?

A. Up to the time that I wrote him that I would get a divorce.

Q. You understood up to that time that he hadn't been able to get anything to do to make a living to support you?

A. That is what I understood.

Q. Did you understand that he was in trouble at the time that you wrote him that you had decided to get a divorce?

A. I think at that time he was in trouble, though I cannot be sure.

Court: Did that trouble arise out of a transaction between your husband and your Dad—Mr. Smith?

A. Yes. But I didn't understand the first part.

Court: Did that trouble that your husband was in arise—

A. Yes, I think it did.

Court: Arose out of a transaction between Mr. Smith and your husband?

A. Oh, no, not the financial—not the money part.

Q. The money transaction arose between him and other people?

A. Yes, I don't like—I don't know that it was money transaction that brought him into trouble.

Q. Well, you finally concluded that Dr. MacLean wouldn't be able to support you and the children if you went to him, didn't you?

A. Yes, and I was tired.

Q. At the present time you are living on a fruit farm with your father?

A. I am staying there.

Q. You and the boys?

A. Yes.

Q. You have been there now something like a year?

A. Nearly a year.

Q. If I understand you correctly the talk which you say you had with Mr. Smith, when you say he urged you to get a divorce, and when you say the property matter was mentioned was before you filed your complaint for a divorce?

A. Yes.

Q. All of the conversations that you had with Mr. Smith respecting his desires to have you stay there were had before you filed that divorce complaint, were they not, except those that you say took place at the time of his engagement and subsequently? Now, is that clear?

A. No, it is not quite clear.

Q. I want to be absolutely fair with you. You said in your testimony that on a number of occasions Mr. Smith said that he didn't think that Dr. MacLean would be able to take care of you?

A. Yes.

Q. Am I right about that? You came to that same conclusion, did you not, as a fact, before you made your application for divorce?

A. Yes.

Q. Now, you say that Mr. Smith told you—you say in your complaint, in effect, that Mr. Smith told you that if you went with Dr. MacLean he would not contribute anything to your support; that is, Mr. Smith would not contribute anything to your support? Is that right?

A. Yes.

Q. If I understood you correctly a while ago, in your testimony, you said in effect that Mr. Smith told you that if you stayed there he would do something by you in a proper way?

A. Yes, if I would divorce the doctor.

Q. Did he only say that in connection with his statement that if you would divorce the doctor he would do it?

A. I wouldn't say that he used those very words invariably. He would change his way of speaking by saying, "Well, have you come to your senses and will give up this man—make up your mind to give him up?" He didn't always use the word divorce.

Q. Well, was all of this talk which you say took

place between you and Mr. Smith about what he would do if you did give him up had before the time when you filed your divorce complaint?

A. Not all the talk before. There was talk before I consented to divorce the doctor.

Q. Well, was there any talk about the property arrangement which you have mentioned after the time when you filed your divorce action and before the time when you say he announced his engagement to you?

A. Well, that was a thing that was more taken for granted, that he had changed very much since I consented to divorce the doctor. He asked if there was anything that he could do. He did everything in his power for me. And when I accepted the conditions that were made, I understood that that meant that when I gave up the doctor I should have everything.

Q. Well, now, at the time when you say you accepted was before you filed the divorce action?

A. Yes.

Q. Yes?

A. At the same time.

Q. And if you made any acceptance, then, of what you say was his proposition, it was before you started the divorce action?

A. Well, I think that when I started the divorce action was the same time that I accepted this proposition.

Q. You don't think it was after that that you accepted it?

A. I should think that the matter of accepting of divorcing the doctor would be accepted, I should think it would be the same time.

COURT: State what was done, what you said.

A. You mean what I said to my Dad?

COURT: Yes.

Q. We would like to hear that.

A. I told Dad all right.

Q. All right to what?

A. All right, I would accept it.

Q. Accept what?

A. His proposition to leave everything to me.

Q. Now, how did he put that proposition? I would like to have the exact words if you can give them.

A. I will give the exact words just as nearly as I can: 'If you will give up this man, I will leave everything I have to you when I am gone.'

I think those are very close to the exact words.

Q. Nothing said about his marrying again?

A. Nothing whatever at that time.

Q. Do you remember whether there was anybody present in the room when you wrote the letter to Dr. MacLean telling him that you had decided to get a divorce?

A. Why, I am not sure, but I rather imagine that Mrs. Smith might have been there. She was with me a great deal of that time.

Q. That is Jessie Carey Smith?

A. Yes.

Q. And not Mrs. P. B. Smith?

A. No. Mrs. Jessie Carey Smith."

(Rec. pp. 240-244.)

It is clear from this that she claims that the consideration for this agreement on one side was the agreement to get a divorce from the doctor. She admitted that Dr. MacLean was now contributing to the support of the boys, (Rec. p. 237).

The defendant admitted at page 317:

"Q. At the time when that conversation took place, and you told him that you had decided to get a divorce, Mr. Smith didn't say anything about a will, did he?

A. I don't remember.

Q. He didn't say anything about property at all, did he?

A. Why, I don't remember that he did, Mr. Mercer, just at that time.

Q. And you didn't say anything about it?

A. Why, I considered that that was it, when I agreed to what he asked.

Mr. Mercer: I will ask to strike that out as not responsive to the question.

COURT: You considered that a continuing proposition, and that you didn't accept until you had concluded to get the divorce?

A. That was when I decided to get the divorce, I considered that that was the—

COURT: The culmination of the contract?

A. The end of it.

Q. Well, now, there was nothing said at that time about a will or property, or anything of that kind?

A. I told you I didn't remember. It was hard for me to make up my mind; I was giving up a good deal; and when I decided to divorce the doctor, that was the only thing then I could think of. I don't remember the details that happened at that time.

Q. Up to that time Mr. Smith had never mentioned the word 'Will' to you had he?

A. Well, the word 'Will'—

Q. That is what I am asking—I am asking now.

A. Well, he may have mentioned the word 'Will.'

Q. Not in relation to his affairs and yours, did he, the word 'Will'?

A. I don't think he ever—I don't know, but I don't recollect the word 'Will' exactly.

Q. Now, you hadn't mentioned the matter of his will to him, had you, in the terms of will?

A. I don't think so." (Rec. pp. 317-18-19.)

And again at page 320 and 321:

"Q. As a matter of fact, the question of his making a will where the term 'will' was used, was never mentioned between you and Mr. Smith at any time, was it?

A. Well, it seems to me that on one occasion—I don't know as this is material here—you say using the word 'will'—it was not a word that was used frequently; but it seems to me that at one time when Dad was making the remark, insisting that I consent to divorce the doctor, that he made the remark—I cannot swear just how this was—that he made a remark that he wished I would make up my mind so that he could—I don't know whether he used the word 'will' or not—I cannot answer that.

Q. Now, he never said anything to you after he was married about any will?

Q. After he was married to the defendant?

A. About a will?

A. No.

Q. Never said anything to you after he was married to the defendant about leaving you any property?

A. No, I don't think the question ever came up.

Q. And Mrs. Smith never discussed property matters with you after she was married, did she?

A. No, I think not.

Q. And she didn't discuss them with you before she was married, did she?

A. Only that night, as I told you, when she came back and told me that she was to marry my Dad.

Q. Yes, but what you said then had nothing to do with property, the way you told it. Did she say anything to you about property that night?

A. Well, I consider that the property comes in when she said she would never interfere between myself and my Dad, between my Dad and myself and the boys.

Q. You mean to say that she said the word 'property' that night in any sense?

A. I don't say that she said property.

Q. Or will, or anything about a will?

A. She didn't say property or will, but I understood it to mean that.

Q. Had you said anything to her so that you could have any reason for understanding that?

A. Had I said anything to her in what way?

Q. With respect to property?

A. I think not.

Q. Did you tell her that in any way, that you claimed to have any interest in Mr. Smith's estate?

A. Why, I don't think it ever came up like that.

Q. Anything of that kind, any other words that could possibly be understood as that?

A. Why, up to that time I don't think I had ever made any remark at all of that sort to her about the property. " (Rec. p. 320-321.)

She claimed on page 322 that she wrote to the defendant about the estate but she could not tell very much about what she said and indulged in probabilities. It will be observed later that the defendant got no such letter. When asked if the plaintiff had talked over the matter of her alleged portion of that estate with her own husband before she started on to Minneapolis, she said this:

"Q. Before you started on to Minneapolis, did you and Mr. Price talk over how much you were to have out of that estate?

A. No—before I left? Oh, you mean, when Mr. Price and I went to Minneapolis?

Q. No, when you went the last time?

A. No, Mr. Price and I didn't talk it over."
(Rec. pp. 324-325.)

And when asked as to whether she mentioned the matter to the defendant in the alleged conversation on the porch while she was in Minneapolis, she admitted:

"Q. You didn't mention property at all in the course of conversation, in any definite terms like one-third, or two-thirds, or the whole, did you, to Mrs. Smith?

A. In the conversation I had with her before when I spoke about the will?

Q. When you were on there to visit, on the porch?

A. I don't think that I did designate the amount.

Q. I think you said you stayed there in the house a week or two altogether, after Mr. Smith's death?

A. Altogether I think it was about that."
(Rec. pp. 325-326.)

So we have her story as to the alleged contract with Mr. Smith in the best way that she could put it, as an experience dactress.

In this connection we call the Court's attention to the following things:

1. The improbability that a man of Mr. Smith's experience as shown by this record who had been twice married and was still a young man would feel the necessity of trying to offer this woman inducements to stay there to be supported by him with her child, so that he could give them his all, when her dissipated husband was having to leave town as the evidence shows, (Rec. pp. 516-517), and she did not even have the money to go with him, is beyond comprehension, it seems to us, of any reasonable mind.

2. She has testified that her second son was born in July, 1902; that the proposition which Mr. Smith made to her to take care of her and her children, including the one with which she was pregnant, was made in the

previous October, and it needs no argument for any rational person to know that this limit of time precludes any possibility of the truth of that claim as to the second boy; neither of them could then know she was pregnant, and we showed that she discovered it afterwards.

3. When she comes to her cross-examination, she admits that Mr. Smith paid for a nurse for her children, (Rec. p. 260); and that what Mr. Smith did was to furnish her money to pay the bills at the house but that she could not remember that he gave her money for her and the boys to live, (Rec. pp. 270-274), as Mr. Smith told Mr. Lauderdale he did, (Rec. p. 516). She did not like to admit, as shown from her side-stepping, (Rec. pp. 284-288), that she was having a great deal of trouble with Mr. Smith after her husband left and before he was married to the defendant.

Jessie Carey Smith, who was the wife of Arthur Smith, the nephew of Mr. Smith, connected with the subsidiary companies over which Mr. Smith was general manager, was often at the residence of Mr. Smith during this period. Appellant claimed, at first, that the trouble between them commenced after he came back from his wedding trip with the defendant, (Rec. p. 265), and undertook, by suggestion, to make it appear that the strain was caused by the defendant, (Rec. p. 265); but was then forced to admit on the cross-examination the following things:

1. That in order to keep Mr. Smith from discovering that she had improperly used money left by him to pay the bills while he was on the wedding trip, the defendant instead of being harsh with her or cruel to her, had divided up her own allowance for some time after she came into the home, to help take care of matters for which Mr. Smith had paid her and the money which had been squandered by the plaintiff, but that it finally came to the point where Mrs. Smith's own allowance was too small and that Mrs. Smith saw to it that those bills were paid, (Rec. pp. 264-268),

and in that connection she had written to a personal friend of hers, (Rec. p. 268), the letter which appears in the Record on page 271, portions of which letter we there read into the record:

“Mr. Mercer: The first sentence that I wish to read is: ‘Hevens, Kid, how I do miss you. I am the only one of my class here now.’ The next is: ‘You heard the song at the Coon Club, didn’t you, “If Money Talks it Ain’t on Speaking Terms with Me.” Well, that is the case with my wife, also with Dad. You see he got a few bills of mine while I was gone and we don’t speak now as we pass by.’

The other sentence, which I want to change—I will see if we can agree on just how I shall put that—the gist of the other sentence, so far as I think it ought to go in the record, is that she states on Sunday, under the title ‘Sunday,’ that she is very unhappy, and sitting there crying then.” (Rec. p. 271.)

2. She admitted that Dr. MacLean supported her prior to the time she went back to Minneapolis, (Rec. p. 271); and after she had left Dr. MacLean and after Mr. Smith’s marriage, the latter gave her some allowance to assist her earnings on the stage, (Rec. p. 272).

3. At one time she seemed inclined to object to the idea that Jessie Carey Smith was brought into the house a number of times before the marriage of the defendant and after she began to have trouble with Mr. Smith to try to pacify them; nor did she like to admit that it was understood between her and Mr. Smith that it was necessary for her to get out and earn her own living; but wanted to put it upon the theory that she had gone to him and told him that she was unhappy there at the house, (Rec. p. 277); yet, she finally got down to the admission that Dr. MacLean had pawned some things from the house, and that she had pawned some things, which things came from her mother and which she claimed, and that it cost Mr. Smith considerable to get the pawn tickets back, (Rec. pp. 277-8). She did

not like to admit that even then Mr. Smith told her that it was not proper for her to remain there, but declined to remember that Jessie Carey Smith went with her to Mr. Smiths office to try to make it easier for her with him, yet would not admit that she had a direct understanding with Mr. Smith that she should pay the house bills and her bills out of what he gave her, but admitted that she paid some of them, (Rec. p. 275).

4. She admitted that when she commenced talking about going on the stage, she had already been considering other occupations. She said, (Rec. p. 276): "Well, there didn't seem to be anything else for me to do. The only thing I could do was dance." Does this look as if she understood that he was to always support her or her children or leave them his property? She admitted that she was very unhappy at the time; but did not like to admit that Jessie Carey Smith was called in to pacify Mr. Smith in her behalf and to try to get her to get him to give more money than he wanted to give, (Rec. p. 276).

5. She admitted writing Mr. Smith after she decided to marry Mr. Price, who was to be her second husband, (Rec. p. 285), to know if he would give her an allowance because Mr. Price was at that time working on a salary for his father, while Mr. Smith, for herself and her father, was giving \$100 a month at the time and after that he gave her nothing as a regular allowance except \$50.00 a month for the children until he helped them build their house, (Rec. p. 286), after which he made no regular allowance.

6. She admitted that she understands that her father was to pay one-half of that money which was paid to her in California by Mr. Smith? Why should her father be asked to do that? Rec. p. 284).

7. She first tried to get Mr. Smith to set her up in house-keeping and take the maid from his house and wife and pay all the expenses of her and her children, (Rec. p. 281),

and this was after she commenced to have difficulty with him. She admitted knowing something about his attempt, when she returned from the stage, to get her uncle and aunt in Ohio, Mr. and Mrs. Wright to take her and the children off of his hands and receive \$85.00 a month from him, (Rec. pp. 281-2).

8. She admitted, (Rec. p. 282), that she understood more fully afterwards, that Mr. Smith got into communication with her father and informed him that something must be done about her, and the children, and arranged to make a contribution of \$50 a month if her father made a contribution of \$50 a month, to support her and the children away from Mr. Smith and that Mr. Smith paid the \$100 a month and that her own father did not make a contribution; and again, (Rec. p. 287), that Mr. Smith raised the question, when she announced her intention of marrying Price, as to whether Mr. Smith should make any further contributions to her. She undertook to side-step upon the theory that she did not have all of the letters. We called her attention to one of her own letters, which she had introduced as "Exhibit C-6," under date of July 22, 1905, in which Mr. Smith said, (Rec. p. 595):

"I do not suppose Mr. Price would want me to contribute to your support after you are married, but with the boys it is different, and I should say after your marriage it would be right for me to send you \$50 a month for the boys, which I will be glad to do."

And in that connection he sent her a wedding present of \$100, and after her marriage, he made no pretence of sending her a regular allowance. If he was treating her as a daughter Price could have had no objection; as an outsider, yes.

10. But after that, she and Mr. Price desired to build a home, and Mr. Smith loaned them some money to aid them in that connection, that she did not know of Mr. Smith's making any regular contribution to the boys after that,

(Rec. p. 290). She offers no explanation as to why she did not some time hint to Mr. Smith during all those times that she claimed to have an agreement with him. We see no explanation except that she never thought of any such claim until she found that there was no other legal chance for a claim.

Then follows the story that she came on to Minneapolis to the funeral; that the note, with the correspondence and the receipt given by her and Mr. Price for the same as a gift from Mr. Smith were given as shown by the record, pages 290-294, and the exhibits shown and numbered at pages 589-590, reading as follows:

A note in Peter B. Smith's handwriting dated October 15, 1906, stating:

("In the event of my death before the maturity of this note, it is my wish that it shall not be considered of any value, and returned to Mrs. E. J. Price as a bequest from me.

(Signal) P. B. Smith.")

The receipt for that note given by plaintiff and Price (both of whom evidently knew that nothing more was expected), which was as follows:

a. "Minneapolis, Minn., Sept. 13, 1907.

Received of Mrs. P. B. Smith that certain promissory note signed by Edwin J. Price, in the words and figures following, to-wit:

\$2,000.00/100 "Mill Valley, Cal., Oct. 15, 1906.

Five years (5) after date I promise to pay to the order of Peter B. Smith Two Thousand Dollars for value received with interest at the rate of 5 per cent per annum from date, and if the interest be not paid annually, to become as principal, and bear the same rate of interest. This note is negotiable and payable without defalcation or discount and without any relief or benefit whatever from stay, valuation, appraisement or homestead exemption laws.

(Signed) Edwin J. Price.

In presence of
Geo. P. Wilson.

Elizabeth Smith Price.
Edwin J. Price."

12. In this connection, upon the evidence of Jessie Carey

Smith, who was perhaps closer to the two of them than any individual during the time it was claimed by plaintiff that this alleged contract was made, and being carried out, as her testimony appears in the record, pages 332-390, the story of plaintiff is refuted. She tells us how she was often at the house after the death of the plaintiff's mother, before plaintiff's second child was born, (Rec. p. 334); that she witnessed one quarrel between the plaintiff and Mr. Smith at his office in the Chamber of Commerce, Minneapolis, where there was quite an unpleasant scene, before the marriage to the defendant, because the plaintiff had pawned certain things that had to be redeemed or lost, (Rec. p. 335); that at another time, after the marriage to the defendant, she was at Mr. Smith's home and he was discussing with the plaintiff the matter of her leaving and trying to earn her own living; that he had recited some of the things she had done that displeased him, and the plaintiff was present and the witness tried to pacify Mr. Smith in his feelings toward the plaintiff. Perhaps this can best be told in her own language:

"A. He said that Bess had done many things that she should not, that she had displeased him in many ways, and been extravagant and wasteful, and even dishonest, in money matters with him; and that he couldn't stand it any longer. And then the question came up; something was said about her going to Chicago to see if she could find some way of earning her living; and P. B. said that he knew she would not be able to earn her living, at least from the start, and he would allow her \$25 or \$30 a month for her expenses while she was there. And I urged upon him that that was hardly enough for Bess, that she could probably not live very easily upon that amount, and told him that he should make it more. And he finally did say that he would allow her more, I think \$40 or \$50 a month, then he said he would allow her."

(Record, p. 336.)

13. Jessie Carey Smith also testified that she was frequently in the house after the marriage to the defendant as

long as Mr. Smith lived; that she was there frequently before his marriage to the defendant and that Mr. Smith and the plaintiff did not appear especially fond of each other and she saw no special sign of any attachment between them, (Rec. p. 337). This witness, herself, was left with two small children dependent upon her and had been supporting them as a stenographer for years as her husband had gone away in 1905, (Rec. p. 338). This witness had gone to the station in the family automobile to meet the plaintiff and her husband when they came on to the defendant's house after the death of Mr. Smith, (Rec. p. 339). She had sent the letter and telegram telling of the death of Mr. Smith, as there was a telegraph strike down East, as she remembered it, (Rec., pp. 337-338), they would be a little late. She testified that she never, at any time during the lifetime of Mr. Smith, heard him or the plaintiff, discuss any property or will or any provision of property or will for the plaintiff or her children, (Rec. p. 339); and that he was not the sort of a man that ordinarily repeated his statements or kept on discussing them, but talked comparatively little, (Rec. p. 340). She was at the house more or less frequently after Dr. MacLean went away because Mr. Smith asked her to be with the plaintiff a great deal to keep her company, (Rec. p. 353); she was there at the time when plaintiff ascertained that she was pregnant and was in and out of the house for hours at a time. She lived not very far away, and went quite often with her husband and they were close friends of the uncle's family and talked confidentially; but in all that time she never heard from any of them, anything about any such arrangement as the plaintiff claims or anything of that sort; but apparently he was caring for her.

"I understand P. B. was giving her a home there, that she had no other place to go and that he was giving her a home.

Q. The matter of how to take care of her, what should be done respecting the family, etc., was

talked, was it, back and forth between you and P. B. and Arthur?

A. Yes.

Q. Did you see any indications during any of that time of Mr. Smith attempting to coerce her into doing anything like giving up Donald, or anything of that sort?

A. No, I never heard that; never heard that talked.

Q. Never heard anything of that sort?

A. No.

(Record, p. 355.)

She said that on one occasion she was there and plaintiff told her that she and Dr. MacLean were thinking of getting another house, (Rec. p. 356). If she was to stay forever, why did they want it? She said that after Dr. MacLean went away she frequently talked with plaintiff, and plaintiff told her she intended to go to him. The testimony in her own words is best given at pages 356-7:

“Q. You may state whether or not Bess talked with you on numerous occasions about intending to go to Donald after he left?

A. Oh, yes, she did.

Q. What did she tell you?

A. That she always intended to go to him. There was never anything else.

Q. Did there come a time finally when she spoke to you about getting a divorce?

A. Yes. She told me one evening at our home.

Q. Tell us what she said.

A. That she had made up her mind that she could not go to Donald and he would not be able to care for them; that he had gotten into further trouble out where he was; and we knew from what he had written that he had been in trouble out there and in jail; and that she could not go to him and that she intended getting a divorce.

Q. Was there anything said in that conversation as to whether Mr. Smith knew anything about her intentions up to this time about getting a divorce?

A. She hadn't told him then.

Q. She said—Tell us what was said.

Mr. Hallam: Do you know whether she told him then?

A. Well, I remember that I told her that she would better tell him about it if she made up her mind to it, and that she said she was going to tell him.

Q. Was that a short time before she applied for the divorce, do you recollect?

A. I don't know just—I don't know about that; it was, of course, before she applied for the divorce."

(Record, pages 356-357.)

Does this look as if she was induced by P. B. Smith to get the divorce for an agreement with him? She had gone to Europe against his will; had married there without his consent; had gone on the stage against his will; had concluded to get a divorce and had not thought to tell him.

Continuing her testimony, the witness said:

"Q. You may state to the Court, tell the Court what the situation was as to whether she always spoke kindly of Mr. Smith, or whether she nagged about him. Tell the Court what the actual situation was and whether you heard talks with her and Arthur about that matter, and what they said.

A. Why, I have heard Arthur cautioning her to be more considerate of P. B. and to treat him with more consideration; that he thought P. B. deserved it and it would be better all around for her to treat him with more consideration. And she was rather critical of P. B. to us, speaking to us about him and criticising him.

Q. This was before Mrs. Grahame came into the family at all?

A. Oh, yes ;this was before that.

Q. Did you see anything, in all your going back and forth to that household that indicated that the plaintiff was doing any special service in the home or looking after Mr. Smith especially in any way?

A. Why, no.

Q. Or doing any of the things that a house-keeper would generally do, in any particular way?

A. Why, no; I don't think that I did.

Q. You spoke of being at the office at one time when the question of pawning things came up as between Bess and Mr. Smith. Was that before Mrs. Brahame was married to Mr. Smith?

A. Yes, it was.

Q. You spoke then of being at the house at a time when Bess was talking about going away, and Mr. Smith was talking about giving her a partial allowance. Was that before or after he was married to Mrs. Grahame?

A. That was after he was married.

Q. Do you know how that occasion came about?

A. Why, I remember that Arthur and I were over there and in the library with Mr. Smith and with Mrs. Smith and Bess; and P. B. was telling us about Bess and about her pawning these things, and he said that she could not stay there any longer, that she had been ungrateful to him and that she had been doing these things that he disapproved of and that he could not have her there any longer. Then was when the conversation came up, which I gave yesterday, about her going to Chicago.

Q. Well, now, did Mrs. Smith—that is the present defendant—did the defendant in this case take any part in that conversation that you recollect?

A. Not that part of it; no.

Q. Did she in any part of it?

A. Yes. P. B. was very angry because Bess had pawned her mother's jewelry, the jewels that had been her mother's, and he had—I think he had at that time—redeemed them, or else he had the tickets there or something of that sort; and he said that he should turn those jewels over to Dewey—Mrs. Wallace. And Dewey then spoke up and refused, and said that she could not have it that way; that she would not have it that way; that he must keep them; that some time he would feel like giving them to Bess again. That is all that I remember of her saying.

Q. Now, do you remember any other time when she took part in any of the controversies in any way at any time you were there?

A. You mean the defendant?

Q. Yes.

A. No, I don't believe so. I never heard any.

Q. Did you go in and out of the house frequently after she was married to Mr. Smith?

A. Yes, we were there.

Q. Were there often to dinner?

A. Yes, sir.

Q. And evenings?

A. Yes.

Q. And various times?

A. Oh, yes, sir.

Q. Did you ever see or hear Mrs. Smith enter into any of the controversies between Mr. Smith and the plaintiff at any time?

A. No, I never heard her.

Q. Did you have occasion to observe how she treated the boys?

A. Oh, always very nicely.

Q. You were there during the times when Bess was away on the stage?

A. Yes.

Q. And the boys were there?

A. Yes.

Q. In the care of Mrs. Smith?

A. Yes.

Q. They generally had a nurse?

A. Yes, they had a nurse.

Q. And did you at any time see any controversy between Mrs. Smith and the plaintiff in any way there?

A. Between Dewey and Bess?

Q. Yes.

A. No, I never did.

Q. Now, do you remember the occasion of when you heard of the engagement between Mr. Smith and Mrs. Grahame?

A. Yes, I remember.

Q. Where did you hear that?

A. At my home.

Q. Who told you?

A. Bess told me.

Q. Who came with her over there?

A. Well, she and Dewey drove over together in the morning; I understood it was the morning after the engagement; and Bess told me.

COURT: Who were together?

A. Bess and Mrs. Wallace came over.

Q. Mrs. Grahame it was then?

A. Mrs. Grahame then.

Q. Drove over to your house together and told you about it?

A. Drove over to my house together.

Q. How did Bess appear that morning?

A. She was very much pleased about it."

Plaintiff's Evidence Does Not Corroborate Any Contract.

Plaintiff's outside witnesses show nothing as to any agreement.

William T. Price, plaintiff's witness, father of her second husband and the grandfather by adoption of the boys, had been a merchant in California; he knew these parties and was in the dry goods business there. He had also met Mr. Smith at one time when Mr. Smith was visiting there and at the time when Mr. Smith was returning from the Islands, (one trip which was in the lifetime of his wife who was the plaintiff's mother), (Rec. p. 128), although witness was inclined to think that it was after the San Francisco fire (Rec. p. 128). He said that Mr. Smith said the boys and Bess were well provided for (Rec. p. 130), and that he wanted to see that they had a good education and means to go into business; that if he lived he would see that that was done and if he didn't that they were well provided for. He said that he thought it was best to leave money in the hands of someone else who would use it in the proper way (Rec. p. 130-1); but he said that Mr. Smith said nothing in that conversation about Mrs. Smith and nothing more definite about his property than indicated above. That the witness' son was at that time the husband of the plaintiff and in the employ of the witness in the store. He did not think that Mr. Smith said at that time anything about giving them a home or anything about the note or anything of that sort.

If this conversation were conceded to be absolutely true, it has no relation to any indication that money was left with Mrs. Smith or that she was made a trustee or that any such contract as the plaintiff claims was made; but from the fact that Mr. Smith had made no indications to anybody, so far as any of us could find after he changed his will in January, 1906, to the effect that he had, or would, or did, have provision for either the plaintiff or those children; and the fact that he had provided for their education in the previous will and had made her a liberal allowance and

was talking to a country-side dry goods merchant, under circumstances where the boys and the mother were the adopted family of the witness' son who was working on a salary, and was the only child as the witness states, (Rec. p. 133), of himself, the sum of \$10,000 would have been a large sum and ample provision for the education of the children and the comfort and ease added to such a situation. The most of us have seen the time when we would have been glad to have received such an inheritance, and if this conversation ever took place, it is very likely that it took place before Mr. Smith changed his will in January, 1906, when the conditions were as the witness says he then described.

The story which Mr. Price tells could not have been true at the time he places it, for Mr. Smith had an outstanding will making no provision, conclusively shown to have been in force at that time; but a few months earlier and in the same winter, his previous will was outstanding with the provisions indicated.

This is no corroboration of any such agreement.

Plaintiff called Mrs. Hartzell, who had formerly lived in Minneapolis, and frequently visited the home of Mr. Smith, as she stated, but not often after Mr. Smith was married to defendant. The witness was a niece of the plaintiff's mother; their mothers had been sisters, (Rec. p. 153). She said that she never had any conversation with the defendant about the will, but she said that Mr. Smith had told her after the divorce that he would not have insisted upon getting the divorce if he had not intended to provide for the plaintiff and her boys. She also said that he told her that the marriage with the defendant would not make any difference; that Bess and the boys would be provided for just the same, (Rec. p. 149), but he told her later that he would have to find another home for the boys because they worried Mrs. Smith, and he intended to take care of them just the same, (Rec. p. 150), and that he hated to lose the boys; she said,

at page 151, that he told her that he intended to have the boys have a good education; she said that the defendant said she understood Mr. Smith's wishes and expected to carry them out with respect to the boys. This witness denied knowing anything about the arrangement by which the plaintiff came to live with Mr. Smith, page 156). She said that the plaintiff married both of the men she married before Mr. Smith ever knew them, (Rec. p. 158), and the conversation of which she spoke she said took place after Mr. Smith had been to the Hawaiian Islands or Japan, (Rec. p. 159); she knew of Mr. Smith's trying to get her aunt to take charge of Bess and the boys, and they did not do it, but she thought there were reasons for it, (Rec. p. 159-60), but this testimony, if true, simply relates to the matter of Mr. Smith's provisions in his former will as is fair to conclude, and whether it does, or not, makes no basis for any such claim, or any corroboration of a claim such as the plaintiff makes in her complaint.

There is no evidence of any such corroboration in this.

Mr. Hartzell was the husband of the plaintiff; he had formerly lived in Minneapolis and knew Mr. Smith to be of the highest integrity. He stated that at the office of the defendant's counsel within a month or two after the death of Mr. Smith, he met the defendant and on coming into the room he said that he was very much surprised that Mr. Smith had made no provision for the boys and she expressed herself to the effect that Mr. Smith had left it to her honor to take care of the boys and see that they had a good schooling, and that she proposed to do it, but that she could do nothing for Bess then. This proposition, if admitted, would amount to nothing because as the evidence showed the defendant had learned after the death of Mr. Smith that he had cut out the provision for Bess, and in that connection, Mr. Hartzell, on cross-examination, was asked:

"Q. There was nothing said in that conversation about there being any contract of that sort, was there?

A. No, sir."

And the witness had admitted, (Rec. p. 141), writing a letter to us, which on his own explanation in the absence of the letter, in court, would naturally lead us to believe that neither he nor his family knew anything about this matter, and General Wilson, whom the witness thought was present in the room, and who had been examined before Mr. Hartzell's testimony by way of deposition, did not recall ever hearing of anything about any interests of the children, Mr. Hartzell also testified that the boys were playing on the floor at one time and Mr. Smith expressed himself as feeling toward them as he would toward his own children, and that, later, after the mother had gone away and left the children in the care of him and the defendant, Mr. Smith had told him that they were very trying to the defendant and he thought he would have to provide a home elsewhere for them, and talked with him two or three times about relieving Mrs. Smith of the care of them. This witness not only disclaims any knowledge of the alleged contract; but his testimony is entirely consistent with the main facts in the case that Mr. Smith had loved the boys and was caring for them at the time of these conversations and had made provision for them which he afterwards withdrew and was then having to make some arrangements to get them out of his family (Rec. p. 140).

Now when appellant's outside evidence was all in its result was that a pack of relatives anxious to see plaintiff prevail had been sworn to tell what they knew and none of them told of any contract, or even a promise or agreement to make any contract, to make any will, or anything of the sort, and nothing definite of her story was left.

Appellee's evidence showed that Mr. Smith never thought of any such tale as she told.

Exhibit 8 is a letter found at page 591 of the record written by Mr. Smith to E. A. Wright, an uncle of the plaintiff, on the 16th day of February, 1913, in which he appeals to the uncle to know if he cannot take the plaintiff and the children and allow Mr. Smith to pay \$85 a month for their support. Counsel, in his brief, seeks to make much of this letter, (Appellant's Br. p. 11), on account of the expressed hope that Mr. Smith might provide for the suitable education for those boys; not that he had to provide for them, but that he should do so if he prospered at the proper time; but the significance of this letter is of the fact that speaking of the plaintiff and the children, he says:

“* * * It now becomes a question of what to do with and for her and her children, the way she has treated me I can hardly be expected to take her back into my heart again, * * * She is evidently very sick of her present life and it seems to be a good time to bring about a change that would be to her advantage and that of the children. The question is, what to do and how to do it. * * * Could you and your family find it in your hearts to take her and the children into your family and let me send to you each month, say \$85, and you charge a reasonable amount for board to pay the balance over to Bess as she needs it to buy clothing for herself and children?”

(Record, p. 591.)

He then proceeds to point out that he might say much more but

“We could hardly think of taking her into our home and hearts again.”

It is in this connection then that he says that it will make a big void in his heart to have the children go; but it seemed best and that if he prospered as he hoped to he expected to make suitable provision for their education,—*not give them his estate.*

It will be noticed in this connection that at the time that letter was written he had made the will which was then outstanding and appears in the record as Exhibit 1, page 585, under date of May 14, 1902, less than one year prior to

that time, and on the very day when he married the defendant in which he had provided that the plaintiff should have \$5,000, as a bequest and that she and his wife should have in trust for the use and benefit of the children another \$5,000 which they should use so far as reasonably necessary for the education of those boys.

He did not make his subsequent will, as will be noticed, until the 10th of January, 1906, wherein he removed those bequests and took out the bequests which he had made to his nephew of the membership in the Chamber of Commerce, (Rec. pp. 585-8), at Minneapolis and the reasons for these were evident.

Conditions changed. His nephew, Arthur C. Smith, had run away from his family and left his wife, Jessie Carey Smith, with two small children on her hands for her to support, (Rec. p. 338), he had, as appears from the facts above stated, become so estranged from the plaintiff that he could not longer have her in his home or expect to offer to take her back there again. He had appealed to her relatives to take her into their hearts if they could find a place, and they had not taken her, (Rec. p. 591). He had sent her to the Pacific Coast with the understanding that her father should pay \$50 a month while he paid \$50 and for a long time he had paid the full \$100 himself, until she had acquired another husband, whose duty it was to support her; that he had contributed \$50 per month to the boys after the marriage of their mother; and had helped her and her new husband build a home, taking their note for the balance which he gave to them by memorandum left therewith when he died and the children had, as counsel subsequently points out in his brief, a living father, who was becoming a prosperous doctor in Colorado and whose ties of kindred and manhood should lead him to assume his parental duties, and a large portion, if not all of the \$10,000 originally provided in the will, had been used in the meantime for the benefit of plaintiff and her children.

Throughout all of the dealings between Mr. Smith and the defendant, there is not the slightest indication anywhere that he ever understood that he was under any obligation of any contractual nature to either the plaintiff or her children; and we have not been able to find any moral reason for his so feeling—he had discharged liberally the duties of a step-father and for it and those who came after him received not thanks but annoyance, expense, trouble, charges of fraud, and misrepresentation, with which counsel's brief so flagrantly glows.

In addition to the foregoing, there was the testimony of the respective witnesses for defendant, to the effect given under each that disproves her claims also.

1. *C. A. Brown*, the assistant manager of the St. Anthony & Dakota Elevator Company, who succeeded Mr. Smith as manager and who with Mr. S. C. Cook, (who had died before the trial), witnessed the will of January 10, 1906, giving all of the property to the defendant absolutely, (which will is Defendant's Exhibit 2, Rec. p. 587), was called with respect to the execution of that will, and testified:

"Q. Did you and Mr. Cook sign that at the time Mr. Smith signed the will?

A. Yes, sir.

Q. Do you remember what conversation took place at the time, if any?

A. *No conversation, as I recall; a simple statement from Mr. Smith that that was his will and he asked us to witness it.*" (Rec., p. 512.)

In other words, Mr. Smith's will was that his wife should have all of his property.

Mr. Brown also testified:

"Q. You know Mr. Smith's reputation for business integrity?

A. Yes, sir.

Q. What was it?

A. The very best."

2. *Geo. P. Wilson*, who had been admitted to the bar

in 1862, and was Attorney General of Minnesota from 1874-80 and had held various public positions, (Rec. pp. 496-497), had gone to Fargo, North Dakota, in 1880, to practice and had become acquainted, there, with Mr. P. B. Smith about 1884 or 5, subsequently moved to Minneapolis and was connected as counsel for Mr. Smith and various companies with which he was connected like the Elevator Company and the Chamber of Commerce, (Rec. pp. 498-9; he knew the parties and drew the will of Mr. Smith, and probated it for her widow as her counsel, and delivered the \$2,000 note to the Prices and took their receipt, and never so much as heard of any such claim as here made until the estate was probated and defendant entered the suit to which the demurrer was sustained. He knew one of the witnesses, (Rec. p. 501), to the will made in Fargo on May 14, 1902, Exhibit 1, (Rec. p. 585), and that first will had been given over to him when the first suit was brought.

As to his connection with the last will and the whole matter his testimony is:

“Q. Did you, as Mr. Smith’s counsel, prepare that will?

A. I did.

Q. During any time of Mr. Smith’s lifetime, in connection with the preparation of that will or otherwise, was your attention ever brought to any contract, or claim of any contract, of Mrs. Price, or “Bess,” as you call her, in the estate of Mr. Smith—during Mr. Smith’s lifetime?

Mr. Jackson: Objected to as incompetent, immaterial and irrelevant.

A. I have no recollection of any such thing.

Q. Did you have any talk with Mr. Smith in which he told you anything about there being any arrangement that Bess should have any interest in his estate? Did you ever hear of that from him?

Mr. Jackson: The same objection.

A. Nothing further than a certain note that Peter B. Smith had taken for money loaned to Mrs. Price.

Q. I have had marked ‘Defendant’s Exhibit 3,

S. K. P.,' what purports to be a letter from Ned Price to P. B. Smith under date of November 1, 1906. Below that, what purports to be a memorandum by P. B. Smith on the same page of the same paper, marked 'Defendant's Exhibit 4, S. K. P.,' and also a document on the reverse side of the sheet containing Exhibit 5, purporting to be a receipt by Elizabeth Smith Price and Edwin J. Price, for a promissory note under date of September 13, 1907; also a document on separate paper with a receipt containing the words in Exhibit 4, which is marked 'Defendant's Exhibit 6, S. K. P.,' and directing the witness attention to these documents, I will ask you, General, if you have seen those before, and if so, where?

A. Oh, yes; I saw them and they were in my possession—or our possession—in my particular possession.

Q. During the time that you probated the estate of Peter B. Smith in 1907, say during September from the date that Exhibit 5 bears, were they in your possession?

A. I think so; yes, sir.

Q. You may look at Exhibit 4 and tell us, if you know, in whose handwriting it is?

A. Exhibit 4 is in the handwriting of Peter B. Smith and his signature is attached to it.

Q. And on the instrument marked 'Defendant's Exhibit 5, S. K. P.,' I see as a witness 'George P. Wilson.' Is that your signature?

A. That is my signature.

Q. Made at the date of that instrument?

A. Yes, sir.

Q. And on Defendant's Exhibit 6, I show you the words 'George P. Wilson' and ask you if that is your signature, also made at the date of that instrument?

A. It is.

Q. I will ask you to examine Defendant's Exhibit 5 and tell us if you had in your possession at that time the note, a copy of which purports to be included therein?

A. I did have.

Q. Did it come into your possession in the handling of that estate, with the other paper?

A. It did.

Q. Now, I notice that Exhibits 5 and 6 contain the signatures of Elizabeth Smith Price and Ed-

win J. Price, as well as having your name as a witness. Were those signatures signed by those two people at the time you witnessed them?

A. They were, in my presence.

Q. You may tell us what took place at the time those instruments, Exhibits 5 and 6, were signed.

A. They came to my office in the Security Bank Building, and the note was delivered and the receipts taken. That is all that I recollect.

Q. In accordance with those receipts as specified?

A. The receipts we refer to were taken at that time.

Q. Was there anything said by Mrs. Price at that time about claiming any further interest in Mr. Smith's estate?

A. I don't recollect of anything of the kind.

Q. Do you recollect any expression of dissatisfaction or anything of that sort?

A. I do not.

Q. If there had been do you think you would have recollected it?

A. If there had been anything specific, I think I would have recollected it, but I don't recall any expression of dissatisfaction. In fact, it was a very simple thing, simply delivered the note and took the receipts. I remember of having a little preliminary conversation with "Bess," as I call her, and as I know her, but that was simply in reference to our former acquaintance. I don't know that I ever saw Mr. Price before; I don't recollect that I did.

Q. Did you at any time during the probation of that estate, ever in any way have your attention brought to any claim of the complainant, Elizabeth Price?

A. I might have had, but do not recollect it.

Q. When is the first recollection you have of ever having heard of any claim of any kind outside of this note?

A. When the suit was brought.

Q. After the estate was probated?

A. Yes, sir.

Q. So that, as attorney for the estate in the probation, you did not know of any claim at all?

* * * * *

A. I don't recollect of anything of that kind.

* * * * *

Q. Were you acquainted with the business reputation of Peter B. Smith, that is, his reputation as to business integrity, during the years 1900 and 1902, 1904 and 1906, down to the time of his death?

A. I have never heard anything against his business integrity. In other words, his reputation for business integrity was good.

Q. You were acquainted with it, as I understand?

A. Yes, sir.

* * * * *

Q. I will now ask you what that reputation was.

* * * * *

A. It was good.

Q. You knew Mrs. Smith, who is now Mrs. Wallace, also?

A. Yes, I knew her.

Q. And during the time this estate was probated

A. Yes, sir.

Q. She was here in Minneapolis a good share of the time?

A. Yes, sir.

Q. And she was the executrix of that estate?

A. Yes, sir.

Q. And you were doing the business for her?

A. Yes, sir." (Rec. pp. 502-3-4-5-6-7.)

Col. Geo. D. Rogers, for years Secretary of the Chamber, testified that Mr. Smith was one of the prominent grain men and his reputation for business integrity was good, (Rec. pp. 509-511).

George K. Gibson, whose testimony appears at pages 392 to 402 of the Record, testified as to his relations with one of the companies of which Mr. Smith was the manager. He testified:

"Q. Generally speaking, he was the sort of man who listened and let other people talk?

A. Yes, sir; in all conferences by us, we would

all get in and argue, and then Mr. Smith would settle it.

Q. His expressions were very brief?

A. Short and decisive.

Q. And to the point?

A. Yes, sir.

Q. He was not accustomed to repeating himself?

A. And he was not accustomed to having anybody argue with him.

Q. He was not accustomed to repeating a proposition over and over in a business way, when you saw him?

A. I never had any such experience, and I never saw anybody that did." (Rec. pp. 392-3.)

Mr. Gibson also tells us, (Rec. pp. 394-5-6-9-400-1), how he himself was on his vacation at the time of Mr. Smith's death and received word from Jessie Carey Smith by telephone how there was trouble in getting telegrams through and how Mr. Bell and Mr. Dunwoody and he had arranged to get the president of the Soo Railway Company, Mr. Pennington, to use the dispatchers' wire and clear the line in order to communicate with Mrs. Smith at the Soo and try to locate the body which had gotten on to another train and ascertain when it would be possible to get the body to Minneapolis and that they were two or three days in doing this; yet, in spite of this testimony and the testimony of Jessie Carey Smith, and the testimony of the defendant, (Rec. p. 446), insists that the defendant and Jessie Carey Smith had perjured themselves in explaining that Jessie Carey Smith was notifying various friends and that there was trouble on the wires and she telegraphed and wrote the defendant of the death instead of telegraphing her sooner—another illustration of how the sanctity of the home at its most solemn moments and the grief of the bereaved ones is compeled to be drawn out and reviewed for an insignificant instance to make all of the annoyance possible in the hope that the plaintiff would give up that which is justly her due upon a speculative lawsuit.

Mrs. Lauderdale. The deposition of Mrs. Lauderdale, (Rec. p. 542). She was the wife of John W. Lauderdale and lived near Mr. Smith and at the time in question. She knew "Bess's" mother and "Bess," as they called the plaintiff, and was a close friend of the family as was her husband and she testified:

"Q. Do you remember a time when Bess was on the stage—Mrs. Price, it is now?

A. Yes, sir.

Q. Do you remember going with your husband one Sunday evening over to lunch at the Smith residence, after he married the woman who is now Mrs. Wallace?

A. Yes, sir.

Q. And do you remember a conversation taking place there about Bess, with Mr. Smith?

A. Yes, sir.

Q. You may tell us what you can that Mr. Smith said that evening?

* * * * *

Q. Before there is any answer, I will ask you, Mrs. Lauderdale, if you can tell us any more definitely about when it was with respect, for instance, to the time when Bess was on the stage?

A. Well, it is hard to remember to tell—it was the first year of Mr. Smith's marriage to the present Mrs. Smith.

Q. The first year?

A. Yes, it was in that first year, I think, in the summer; he was married in May and it was along toward the last of the summer or fall, I should say.

Q. Of the same year?

A. Yes, as I can remember. It is quite a little while ago.

Q. So that if he was married to Mrs. Grahame in May, 1902, it would be your best recollection that the conversation took place in that same fall?

A. That fall, I would say, as near as I can remember.

Q. Some time during the summer or fall?

A. Yes, it was late.

Q. Was Bess present?

A. No.

Q. Who was present?

A. Just we four: Mr. and Mrs. Smith, Mr. Lauderdale and myself.

* * * * *

Q. Mr. Smith was present during all that time, was he not,—and who brought up the conversation?

A. Mr. Smith.

Q. Now, I will ask you to give us that conversation as best you remember it.

* * * * *

A. It was in reference to him feeling so badly about what Bess had done.

Q. Now tell us, as far as you can, what Mr. Smith said and what was said by others.

A. Well, it was in reference to—so much had been said about outsiders, and he said he didn't care for the general opinion of people, but there was some of his intimate friends that he would like to explain the situation to and let them understand; aside from that he didn't care, and he went on to tell how extravagant she had been with money he had given her after her mother died, to take care of the house, how she had misused it and the way it had been spent and the many bills that had been contracted even aside from that, and the things that had been done—lots of things that I can hardly remember; but it was all pertaining to the way things had gone.

Q. How did Mr. Smith appear during that conversation?

* * * * *

A. Well, he felt bad.

Q. He appeared to feel badly?

A. Yes, very crushed and hurt, and he cried."

(Rec. pp. 543-545.)

She also testified (Rec. pp. 552-3), that Mr. Smith had said in the conversation that Sunday night that the money he had given her to use for the house had been used in many ways; she said that he treated Bess as a step-father should treat a step-daughter and as a daughter, while she was there and would frequently come to their house and get her and her husband to go down and play cards with him and he was at their house perhaps three or four times a week. She said that he had not in the meantime made

complaint to them about Bess, (Rec. p. 550), but when pressed by counsel she said:

“A. I don’t think it all came at that one time; I think Mr. Smith had lots to contend with before that time in regard to Bess’ actions, but that was the time he opened his heart and complained, because we all knew that everything wasn’t just right there; everything wasn’t harmony up to that time.” (Rec. p. 550.)

She finally said at page 551, that there had been slight objections that were not as strong as the one at that time. She thought they were after Bess went on the stage, but she could not say that they were all after that even. It was evident that she was trying to shield Bess in this examination, but Bess’s counsel was pressing her a little. She said that the defendant had nothing to say against Bess in the Sunday night conversation. She said that Mr. Smith was very opposed to the plaintiff going upon the stage and told the witness. She said that Bess was apparently the housekeeper for a while, but she never saw her do very much housework and Mr. Smith kept a nurse for the boys, (Rec. p. 555), and she also tells us that during the time Bess was on the stage, the two children were kept by Mr. Smith and Mrs. Smith and staid in their house. She then testified:

“Q. Mrs. Smith had the oversight of those children at that time?

A. Yes, sir; and she was very good to them. * * * * *

Q. How did Mrs. Smith, so far as you could tell, appear to treat the children?

A. Very well.

Q. On all occasions?

A. Yes, indeed.” (Rec. p. 557.)

J. W. Lauderdale deposition, Rec. p. 513. Mr. Lauderdale was a close friend of Mr. Smith and knew all of these parties and was much at Mr. Smith’s house. At one time after Mr. Smith married the defendant, he and his wife were invited over by Mr. Smith, (Rec. p. 515), to a Sunday night lunch, the exact year he cannot tell; they were near

neighbors and he tells of the same conversation of which his wife told in which *Mr. Smith broke down and cried* and it is told best in Mr. Lauderdale's own language:

"Now, you may tell us how that conversation came about and what your recollection of it is.

A. Well, Mr. Smith, after we had been sitting at the table for some little time, Mr. Smith said, 'Mr. Lauderdale, there is something I want to talk to you about that nobody knows anything about; I haven't talked to anybody about it and it is simply setting me nearly crazy; and that is in regard to the actions of Bess and the reports that she is circulating in regard to my treatment of her. I think you know the family well enough and know me well enough, to know that I have done everything that I possibly could for Bess, and for the children, and it has got to the point where I must draw a halt.' That was, if I recollect rightly, it was after she had separated from Donald. I think I am correct about that, and he went on to relate the circumstance. He said: 'I told her, now Bess, I will pay the house rent and will give you a certain amount of money, which will be liberal, for the maintenance of the house and you pay the bills and take care of the house just the same as though you were in absolute charge of the house, which I want you to be, and you pay the bills and I will give you an allowance each month.' If he stated that amount, I cannot recall the exact amount, but if I remember rightly, it was between \$200.00 and \$300.00 a month that he gave her a check for and he supposed everything was running along smoothly, until two or three months after that bills began to come to him for unpaid grocery bills, market bills, meat and other bills which she was supposed to have paid from this allowance that he gave to her. He said, 'I paid them and protested to her for an explanation as to why she hadn't paid them. She gave some excuse, I don't recall what excuse she gave to me, but in my opinion it is largely on account of Donald's habits.' He said he knew that Donald was gambling and that she had on two different occasions taken her mother's (that was her own mother's, not the present Mrs. Smith's) coat, a diamond ring and several other articles and pawned them to raise the money to give to Don-

ald; that she had done that twice, and, says he, 'It has got to that point where I have just simply got to stop; I will not submit to it any longer. She has told different parties in regard to what I was doing and what I was not doing, and it certainly is not fair to me that she should circulate those stories, and I have no defense at all. The whole gist of the matter is that I am going to stop; I am not going to do anything more for them. As long as the children are in my house, I will take care of them, but further than that, I must absolutely stop.' He sat there and the tears ran down his face as he was telling it. Now, that is about the conversation. It was simply to relieve his own mind apparently, have somebody else know the condition that existed, rather than keep it shut up within himself. He was not a communicative man, and it is the only time I ever heard him mention a thing pertaining to Bess or his family matters.

* * *

Q. You were well enough acquainted with Mr. Smith to know whether he was a reticent man, or talked about his affairs generally?

A. I considered him a very reticent man.

Q. This was the only time you heard him discuss the question?

A. The only time.

Q. Possibly Mr. Jackson's motion might relate to the question of the way Mr. Smith appeared at the time, and I will ask you how he did appear at the time of that conversation.

* * *

A. He appeared very much wrought up and hurt.

Q. Was that the time you say he cried?

A. Yes, sir.

Q. Do you recall whether there was anything said by him about whether or not it was advisable to give her further money?

* * *

A. Yes, I think there was; he said 'It isn't justice to me nor to her to allow her to have money that she can spend according to her ideas. She is simply extravagant to the limit, and it isn't safe for anybody to supply her with money calculating to meet her requirements, as it cannot be done,'

or words to that effect. That is practically the sentiment of it."

(Record, pp. 516-518.)

Mr. Smith had also told him, page 521, of telling Dr. MacLean that he could not stand him any longer and again, (Rec. p. 526), the witness said that he had known Mr. Smith for many years and had a conversation with him after Bess went West about his contributing to her support. That conversation took place after the plaintiff had married Mr. Price and he tells of that as follows:

"A. He told me that he had made an arrangement to send Bess and the boys West, they wanted to go West to her father, who was to contribute \$50.00 a month and he was to contribute \$50.00 a month for the support of Bess and the children. He had made arrangements with her father to each contribute \$50.00 a month toward the support of Bess and the children, and he said they sent them West and he said that from some misfortune that her father had, he wasn't able to contribute his portion of the money, \$50.00 a month, but that he had supplied the whole amount; he had sent Bess a check for \$100.00 a month himself and did so up to the time that Bess had married Price; and he said after she had married, he felt as though his obligation had ceased."

It will thus be seen from the detailed evidence and citations to the record given above, that Mr. Smith was a man of the highest business integrity, of few words, and steady action, not accustomed to pleading with persons to do a particular thing or likely to make promises which he did not keep; that he had this family thrust upon him by the unfortunate situation; that he liked the boys and had arranged to plan for their education and for \$5,000 to their mother at the time he married the defendant, but that his subsequent contributions to them and her subsequent treatment of him had so estranged him from her that he did not feel any particular regard for her. She had been married to a new husband; he had contributed to the building of their home; the children had been adopted by the new hus-

band and had taken his name; the plaintiff had a living father, able to go to Europe for travel and from whom she did not want to be separated by adoption to Mr. Smith, before she became so unruly.

He felt, as any other person would feel under the situation, that his property was his own and he had contributed enough and more than he should have paid to care for this family. He had had but \$10,000 when he was married and it had cost him a large share of that after his marriage to the defendant to look after the plaintiff; he had concluded there was no use of giving her money because she wasted it, and, feeling no reason for doing so, he made a new will giving everything that he had accumulated after his marriage, and the balance of what he had not spent upon the plaintiff and her family to the defendant, absolutely, except that he gave the \$2,000 which was the balance for the completion of the home of plaintiff, over to her by memorandum which he attached to the note which he held against her and her husband, Mr. Price.

He had no special service; he had had grief rather than love and obedience from the plaintiff; he could not be expected to longer impose upon his new wife the care of the grand-children of a former wife who had a father and mother and a grand-father and a step-father who had adopted them, all living and able-bodied. In the light of these things, if there were none others, the story of the plaintiff is entirely discredited. But even if it were true, as she told it, it amounts to nothing as the legal rules given hereafter will show.

Nancy Bates, (Rec., p. 402). It is intimated that the defendant went forth to seek Mr. Smith's money as a newcomer and a new acquaintance, but there happened to be a lady by the name of Miss Bates, who had lived in Fargo, North Dakota, when Mrs. Graham, now the defendant, and Mr. Smith, had lived there in the '80's; she hap-

pened to be a mutual friend, who at the time of the trial resided in Washington but had been living in St. Paul and Mrs. Graham was her guest in St. Paul as an old friend of her family and from there went with her brother as the guest of Mr. Smith, he then being a widower and she a widow, to the luncheon to which the defendant attended in Minneapolis before the engagement, (Rec. pp. 402-3), and she also happened to have been a guest in the Smith home immediately following his death and remained there for some time when Mr. and Mrs. Price, the plaintiff and her husband, came there and she staid there until they left and she testified:

“Q. Did you hear any discussion at all, or any talk at all between Mrs. Smith and the plaintiff about any property matters, or will, or anything of that sort, during any of the time they were there, yourself?

A. No, I did not.

Q. Did you see any attempts on the part of the plaintiff to get conversations with Mrs. Smith, which were repulsed in any way?

A. No.

Q. How did Mrs. Smith treat the Prices while they were there, as appeared to you as a guest there in the home?

A. As she treated her other guests, very cordially.” (Rec. pp. 403-4.)

The plaintiff did not even cross-examine her.

Mrs. F. C. Duncan. Mrs. F. C. Duncan, the mother of the defendant, would have been called to testify but a stipulation is entered to take the place of her deposition which appears at page 608 of the Record to the effect that she resided in Fargo, North Dakota, when Mr. Smith lived there and their families were friends and that she frequently visited the home after he married her daughter; that in a conversation with Mr. Smith which Mrs. Duncan had a short time prior to the marriage to her daughter, he told her that he had had Colonel Douglas, a Fargo lawyer, prepare his will, leaving most of his property to her daughter and that

he was very happy to do so; that he wished to have her well provided for and that he had provided liberally for Mrs. MacLean, whom he spoke of as his daughter, but that he wished his wife to have most of his property or he would not marry her and that the Mr. Douglass mentioned was the man who witnessed that will. The will in question was introduced as Exhibit 1, (Rec. p. 585), and is the one which gave Mrs. Smith all of the property except the membership in the Chamber of Commerce, which he then left to his nephew, and the \$5,000 to the plaintiff and the \$5,000 in trust for the benefit of the children and which the defendant testified was made and the copy handed to her just after the marriage and that she had known nothing about it herself prior to that time, (Rec. p. 461).

Counsel intimates in his brief that this was an unusual circumstance, but it must be remembered in this connection that Mr. Smith was a business man of experience and probably knew that if he had any will outstanding at that time, the statutes of many states would revoke it by the new marriage. There is now such a statute in Minnesota, Section 3666 of the Revised Laws of 1905, which reads as follows: "If, after making a will, the testator marries, the will is thereby revoked."

There was the deposition of *Anna Wright*, who was the sister of the mother of the defendant, in which she says, (Rec., pp. 534-5), that when Mr. Smith tried to get her and her husband to take "Bess" and the children that they did not do so.

"Q. Why * * * * * ?

A. My health would not permit."

Emily Carlson, (Rec. p. 558), testified on deposition that from 1897 until 1907 she staid constantly at the home of Mr. Smith unless she was away two weeks at a time once in a while, except that she went to Sweden in 1895 and came back in the spring of 1896 and was there in the capacity of general housework to begin with, (Rec. p. 559). She had

been there in the lifetime of the plaintiff's mother and did all of the housework for the house. She ordered most of the groceries and there was the nurse who had charge of the boys, (Rec. p. 560), and that the witness ordered the groceries and things of that sort most of the time after the plaintiff's mother died, (Rec. p. 560-1). She would have breakfast about 8 o'clock in the morning and she thought the plaintiff got up for breakfast more often than she staid in bed and the boys would be down to breakfast, of course, (Rec. p. 561). The witness staid on until after the marriage to the defendant and the plaintiff staid there for some time after that but did not have anything to do with the house-keeping, but sometimes took care of the boys a little while and went back and forth and the witness could hardly tell what she did do.

"Q. Was that about the same as it was before Mr. Smith married?

A. Yes, sir." (Rec. p. 562.)

She said that Bess was supposed to be the head of the house as Mr. Smith told her during the time she was living there alone that she did the housework and the nurse did the work for the boys, but that the witness, (Rec. p. 567), went ahead and did practically as she pleased about running the house; that during all of that time she never heard any discussion about property or anything of that sort between Mr. Smith and the plaintiff, (Rec. p. 567). She was there at the time of Mr. Smith's death and for some time thereafter and during the period that the plaintiff and her husband came on; that they staid at the house with Mrs. Smith and some of the time with Jessie Carey Smith, who with her husband, when he was there, had been frequently at the house, (Rec. p. 568-9), and were very close friends.

"Q. And how did you happen to go?

A. Well, they had written for money, and said that Bess was ill; and we were not sure how things were about that; and we thought it best for me to go down and see about it.

Q. That was after the wire was sent?

A. Yes.

Q. Which you saw there?

A. Yes.

Q. And when you got down there did you have a talk with Bess as to what she expected to do after that?

A. As to what she expected to do?

Q. Yes.

A. Yes.

Q. Tell us what that was.

A. Why, she was going home.

Q. Going home?

A. Yes.

Q. Anything said about Donald going with her?

A. About Donald going with her?

Q. I mean about Ned going with her. I get these husbands mixed.

* * * * *

A. She spoke about going back to Mill Valley and taking care of the boys there and earning her living some way, doing something. She said they had their little home there and she would go back to them alone and take care of them some way.

Q. Nothing said at that time about claiming to be any will, any contract for a will with Mr. Smith?

A. No, there was never anything of that sort said to me.

Q. You never heard of such a thing until after this estate was probated?

A. Never heard of such a thing. I never heard of it."

(Record, pages 358-364; 365.)

She also testified that he had many friends, among them officers of trust companies, during these times, and that he was a man who kept his word in dealings, (Rec. pp. 355-6).

Mrs. Wallace's mother (Mrs. Duncan).

Mr. Hallam.

"Q. But you proceeded to marry Mr. Price, and had the boys adopted as Price's children?

A. When you speak about Dad investigating Mr. Price, he speaks about him very well in that letter.

Q. Yes, I understood so.

A. I wondered if you meant anything outside of that letter. I knew what the letter said, yes.

COURT: You say the boys were adopted by Mr. Price?

A. Yes, Dad wished them—

COURT: Did they take the name of Price?

A. Yes, sir; they did. But they don't go by that name now.

Q. Well, the ultimate act was, however it arose, that from the time you married Mr. Price, Mr. Smith quit making you any allowance for yourself?

A. Yes, any regular allowance.

Q. Well, now, all he did after that was an occasional Christmas present or something of that sort, besides what he did in the way of the home, wasn't it?

A. Why, yes, I presume so. Just what do you mean? There was never any regular allowance except for the boys.

Q. Well, that is what I am trying to get at.

A. Yes.

Q. He didn't pretend to contribute money to you individually right along after that, did he?

A. No.

Q. That is what I want. Now, there came a time in October, before he died in August, when he loaned \$2,000 to you and Mr. Price to aid in building a home, did there not?

A. I don't know just when it was, Mr. Mercer.

Q. You don't know just the amount?

A. I don't know just when it was. I thing it was that amount.

Q. You think it was that amount?

A. Yes.

Q. Do you remember that he sent that to you in October and that after October he made no allowance for the boys?

A. I don't remember.

Q. Did you ever know of his making any allowance of any kind to the boys after he loaned that money to build the house?

A. I don't—no, I don't remember." (Rec. pp. 288-290.)

It was not claimed by the plaintiff that the defendant was in any way a party to any original conversation or arrangement had with Mr. Smith and under the circum-

stances, could not have been such a party, but the plaintiff evidently thinking that she had fixed one time and place where no refutation of her story would be possible, told us in dramatic terms how she had gone out with Maud Marshall in the evening and left the defendant with Mr. Smith at home and how she came back to the house late in the evening and that the defendant who was then Mrs. Grahame had come into her room and sat down on the edge of her bed and in loving tones and splendid terms had told her that she would not take her place with Mr. Smith and that everything would go on just the same as it had gone on, etc., etc., but in the many years that had elapsed between the times, her memory slipped a cog and she overstepped the points by simply forgetting what actually took place and was capable of proof by an outsider as well as the defendant.

How much of this dramatic story had been rehearsed by the plaintiff by reason of her experience upon the stage, we do not know, but a nice damper was placed upon it when we found one Miss Jane Clark who, at the time, was living in Portland, where this case was tried, who had formerly lived in St. Paul, Minnesota, and was a friend of the family and a guest at the Smith home and went with the plaintiff on the evening of the engagement, and came back to the Smith home, spent the night and was present when the engagement was told to the plaintiff, and herself slept with the defendant in a double bed in the same room where the plaintiff slept on a sofa that very night, and who tells us what took place as follows:

“Q. You may tell us what took place that evening there, so far as you saw.

A. Well, Mrs. Price and I had been at a party in the evening with some friends.

Q. A little louder.

A. Mrs. Price and I had been at a party with some friends in the evening, both to the dinner party and theater afterwards, and when we came home, why, Mrs. Wallace—

Q. Mrs. Grahame, it was then.

A. Yes; Mrs. Smith—told us—well, I remember her telling us about her engagement. That is about all.

Q. Now, do you remember the room that was occupied by yourself that night?

A. Yes.

Q. How many were in it?

A. Well, I slept with Mrs. Smith, Mrs. Wallace and Mrs. Price.

COURT: You will have to speak a little louder.

A. Three of us slept in the room.

Q. You slept with Mrs. Grahame?

A. Yes.

Q. And Mrs. Price, whom we call Bess, slept on a couch in the room?

A. Yes.

Q. Did you hear Mrs. Grahame tell about the engagement to Mr. Smith that evening.

A. No, I don't remember of her telling of the engagement.

Q. She didn't say anything about the engagement there?

A. Well, I don't remember when she told it, but I remember she told of the engagement that evening.

Q. Told of the engagement that evening?

A. Yes.

Q. Did you occupy a room with them all night?

A. Yes.

Q. Were you and Bess up in the room when Mrs. Grahame came up, do you remember?

A. I think we went in her room. I think she was reading to Mr. Smith that evening, and we went in there. We went in to talk with them.

Q. You went in to talk with them?

A. Yes.

Q. Well, now, when she told about the engagement, was there anything said by her to Bess about property matters or anything of that sort?

A. No.

Q. Or about her not intending to come between Bess and Mr. Smith?

A. No, I heard nothing of that.

Q. Did she take Bess on her knee, or in her arm, or anything of that sort?

A. Not that I know of.

Q. Didn't see anything of that kind?

A. No.

Q. Or hear anything of that kind?

A. No."

(Record, pp. 341-343.)

Her testimony appears at pages 341-350. She tells us that there was none of the hugging and demonstrations of affection, and no story of the property and of the things which plaintiff intended so dramatically to impress, took place at all. She also tells us that she was down at breakfast the next morning and did not hear any discussion at that time about any properties or anything of that sort; and it will be remembered that the plaintiff had tried to make it appear in this report that she had gone down to breakfast ahead of Mrs. Grahame and Mr. Smith had modified his alleged contract by telling her what he expected to do in leaving her and the children two-thirds of the property. The witness remembered that they had been with Maud Marshall and that they were all friends and that she had been first introduced to Bess by either Miss Bates or Mrs. Grahame, (Rec. p. 250).

So aside from the plaintiff's testimony, there is not a particle of evidence in this case of any promise upon behalf of Mr. Smith to leave any property to the plaintiff or her boys by way of a will under any contractual arrangement with either the plaintiff or the defendant and all of the testimony of intimations and suggestions of the relatives who composed the array of plaintiff's witnesses is entirely inconsistent with the provisions which Mr. Smith made and withdrew, except the bare and indefinite story of the plaintiff herself which, upon its face, is unreasonable and entirely inconsistent with the honest treatment which Mr. Smith always gave in his most generous attitude to the children, whom he loved, to the time of his death, except as they got away from him and were kept away from him and adopted by another party who meant nothing to him, it

would be perfectly natural for him to think less and less about them and consequently less and less of them as the defendant states in her testimony, page . . . , appeared to be the case.

DEFENDANT.

Marie Dewey Smith, (Rec. p. 404). The defendant's evidence, therefore, was not needed, but we called her to the stand and she told us in a very straightforward manner how she had visited Miss Bates in St. Paul for about three weeks at the time she became engaged to Mr. Smith, (Rec. p. 405), how she was the same party who had been sued under the name of Marie Dewey Smith in the Minnesota case, (Rec. p. 401), how she and Jane Clark were invited to dinner at the Smith's and Bess and Jane Clark went away before dinner and during the evening she became engaged, (Rec. p. 405). Miss Clark and the plaintiff returned later in the evening and they slept in the same room and she told them about the engagement; that there was nothing said about property matters at all; that she knew nothing about any claim of Bess upon Mr. Smith or anything of that sort; that she had a talk with Mr. Smith at the time of the engagement with respect to what property he had and with respect to whether or not he expected Bess to continue with the boys to live with them, but that that conversation took place the next night after the engagement, and was the night after Bess claimed that she had a talk with Mr. Smith about the property rights. In her own language, she gives that conversation:

"A. We took a short walk around the block, and it was the first time that Mr. Smith had ever broached the subject of any financial nature at all; and he said then, 'Dewey, I am not a rich man.' He said, 'I had at one time quite a property and lost it, and I have accumulated now about \$40,000; but,' he said, 'I am getting a good salary, and my future is very bright. And Bessie is an attractive girl, and in all course of events she will marry, and she is fond of her children,

and she will want her children with her, and will be away, and I shall be alone; and I have known you for many years, and I want you to come to my home.' And then he went on to speak about the property, and he said, 'I hope and expect that I have started now, that my property will accumulate very rapidly, and that we will have all we want to go on with.' And that is about all the conversation we had. I don't remember anything else that was said.

Q. He didn't say anything about ever having made any agreement with the plaintiff here to give her his property?

A. Nothing whatever. I never heard of it.

Q. Did you ever hear of any such thing until—that any such thing was claimed even—until the suit was brought against you the first time?

A. I heard nothing of it. I never knew that such a contract could ever be made between people. It was as much of a surprise to me as a bolt out of a clear sky when that was—

Q. What was the next time that Mr. Smith said anything to you about property in any way?

A. The next time?

Q. Did he at any time before the matter of the will came up?

A. The matter of what will?

Q. Of the will at Fargo, after you were married.

A. Oh, no. There was never anything said about the property after that at that time.

Q. Now, did you know that he was making a will at the 14th of May, until after it was made?

A. No, I didn't. I knew nothing about it.

Q. You were married on the 14th of May?

A. Yes.

Q. 1902?

A. Yes.

Q. After the marriage did he call your attention to the fact—I mean sometime after, that he had after the ceremony made a will?

A. Yes.

Q. What did he say about it?

A. We were married about noon and leaving on the three or four o'clock train on the Great Northern. Passing through the hall, it was in the lower hall, he said, 'Dewey, here is a copy of my will, which you had better keep among your pos-

sessions.' I took it, and I don't remember when I even looked at it. He said nothing more about the will. I took it as a matter of course that that was his will.

Q. Did you know where he left the original at that time?

A. No, I don't think he ever told me where he left the original.

Q. Did you know that he had made a subsequent will to that will of May 14, 1902?

A. No, I did not.

Q. Until after he was dead?

A. No, did not.

Q. He never told you that he had changed his will in any way?

A. No, he never did.

Q. Nor that he had made any new will?

A. No, he never did.

Q. When and under what circumstances did you learn of the will that was finally probated? Tell the Court how it came about.

A. I think Mr. Bell telephoned me that it was time to look into business matters, and I better come down to the office and see about the will being probated.

Q. That is Mr. James S. Bell, of the Washburn-Crosby Company?

A. Mr. James S. Bell, of the Washburn-Crosby Company.

Q. He was the gentleman that Mr. Gibson said was a sort of superior officer?

A. Yes.

Q. Did you go down to Mr. Bell's office?

A. Yes, I went down to Mr. Bell's office.

Q. Now, the St. Anthony & Dakota Elevator Company offices are right on the same floor as the Washburn-Crosby, and they adjoin?

A. Yes.

Q. And their executive offices adjoined each other?

A. Yes.

Q. When you went there, tell the Court what happened.

A. I went into Mr. Bell's office, and he sent for some man to get Mr. Smith's private papers from the vault. And he brought in a tin box, about that square.

Q. About two feet?

A. Yes, about two feet square. And he said, 'You knew that Mr. Smith had a will?' And I said, 'Yes.' And he said, whether he said a later will or not. And I said I knew about the will. He picked up the will and handed it to me, and I glanced over it, and I says, 'This is not the copy of the will that I have seen.' 'Well,' he said, 'This is his last will.' And I said, 'No, he has made no will.' He said, 'Yes, Mrs. Smith, he has made a will.' I heard in the office that he had made a new will.' And he handed it to me and I read it. And that was the first time that I had ever known of a new will being made or had heard of a will being made. I had always supposed that the copy of the will at the time of our marriage, that that will made at the time of our marriage was the one and only will that he ever made.

Q. Now, after that conversation you brought that will to our office, that is, the offices of Wil-son & Mercer?

A. Yes, Mr. Bell.

Q. For probating?

A. Yes.

Q. And you went to General Wilson to do that work, principally?

A. Yes.

Q. And he carried on the active probaton of that estate for you?

A. Yes.

Q. During the probaton of that estate, did you in any way receive any intimation from anybody that it was claimed that Mr. Smith had made any other will, or any agreement to make any other will?

A. None whatever.

COURT: Did you have any agreement whatsoever with Mr. Smith prior to your marriage with him in relation to property rights?

A. None whatever.

COURT: There no ante-nuptial agreement, either orally or in writing?

A. None whatever. I didn't think of such things or even a verbal agreement. There was none whatever.

* * *

Q. Did you ever have any agreement, either oral or written, with Mr. Smith, with respect to what should be done with his property?

A. None whatever.

Q. So that there never was any talk between you and Mr. Smith as to your giving any property which he would leave you to the plaintiff?

A. I never heard of such a thing.

Q. Or for the children?

A. No, I never heard of such a thing. It was never mentioned.

Q. The first you ever heard that there was any claim of that kind was when the suit was brought in Minnesota?

A. Yes. That was the first time I had ever heard of it, of such a thing at all.

Q. And since that time you have been searching to see if you could find anything about it; and outside of these pleadings you have not found anybody that says anything of the kind, except what the plaintiff said here on the stand, have you?

A. No; never have I heard of any possible way or any possible word to give me an idea that such a thing ever happened, because it never did with me, or that there was ever such a contract or understanding or the least intimation that there was such an understanding."

(Record, pp. 406-412.)

With respect to the matter of the visit of Mrs. Price upon the death of Mr. Smith, it was Mrs. Price's story that Mrs. Smith again recognized the alleged agreement and told her to go back to California; that she need not employ any lawyer or pay any attention to the estate in Probate Court; that is what she here claimed in the complaint, (par. XVI, p. 16), but her story amounted to nothing of this nature (Rec. pp. 321, 326); but the defendant tells how she furnished the \$100 which she supposed was to buy tickets back to San Francisco and after they had been gone a number of days they returned to the house and wanted more money and she again furnished them \$160 and after they had gone for some time she had a letter from Ned, who was Mr. Price, (See telegram Ex. D, p. 598), which is Exhibit 3, p. 602, and which is a letter from

Chicago instead of San Francisco, dated the 28th of September, claiming that Bess was completely broken down and had been in bed since she reached Chicago, and that they had had forty-eight hours since she had taken no nourishment. He said then that he had the tickets home, but needed some more money. He said that if the doctor were not out, he would send the doctor's certificate of Bess' condition, evidently realizing that their veracity would be questioned, and would mail it that night.

"If you can let me have \$100 as soon as possible I will return it when we arrive home * * *."

Hoping that you are well and can accommodate me, I am very sincerely yours, Ned."

She wired him back, (Exhibit 4, p. 303), to the effect that she was sorry for his misfortune, but

"Cannot do anything more for you."

It would seem as if she had reason to feel that way when she had twice given them money for tickets home and instead they had gone to Chicago and were hanging around there wasting money. After this wire of discouragement, so that too much dissipation would not take place, the defendant sent Jessie Carey Smith down to see whether or not the Prices were sick and furnished her money with which to pay for the third time for their transportation, (Rec. p. 414). Jessie Carey Smith went down to Chicago and bought the tickets herself; took the note of both Prices for it, which appears on page 603 of the Record as Exhibit 5, with their receipt which appears on the same page, and later, under date of January 11, 1908, got a letter from Mr. Price telling of his hard luck and that business was so poor, but

"I will attend to your matter as soon as possible, but for the present I am very sorry, but if is impossible."

We here have the furnishing, for the third time, of money to enable this irresponsible pair to get back to their home and children when they had gone on to Minneapolis without any special reason, after the funeral which bears

out Mr. Smith's attitude given by the Lauderdale's, that there was no use to give them money.

As to the conversation on the porch, the defendant said that she made no attempt whatever to avoid conversation with the plaintiff; that she did have a conversation with her on the porch at the house; that she said nothing at the time about any agreement and that no agreement with Mr. Smith was mentioned in any way, nor did she say that it was time for the Prices to go home or anything of that sort, (Rec. p. 414); but that the plaintiff herself brought up the matter of going home. We then asked:

“Q. Was the matter mentioned in that conversation about the fact that this note had been left for them?

A. Yes.

Q. In that conversation was there anything said by either of you to the effect that you would probate the estate and send them their interest?

A. No, nothing.

Q. Did you understand at that time that they had any interest?

A. No, I didn't understand they had.

Q. Outside of this \$2,000 note?

A. Non whatever.

Q. Was there any claim made by the plaintiff to you at that time that they had any interest?

A. No, there was no claim.

Q. You did tell the plaintiff that you were surprised when you found this new will had been made, didn't you?

A. Yes, I did.

Q. And you were surprised?

A. Yes, I was.

Mr. Hallam: I suggest you do not ask these leading questions.

Mr. Mercer: I understand she testified to that. I understood her to say Mrs. Smith said she was surprised to find this will.

COURT: She said that at the time the will was shown her the first time.

Mr. Mercer: This is the only time they talked about this will, as I understand.

COUR: I understand you are asking about the

conversations which took place between her and the plaintiff on the porch.

Mr. Mercer: I am. I understand her to say that Mrs. Wallace said to her in that conversation on the porch that she was surprised to find this will.

Mr. Hallam: No, Mr. Mercer; she has not so testified.

Mr. Mercer: I think if you will read her cross-examination you will find she did.

A. Mr. Mercer, do you mean to ask me did I say I was surprised at the second will, surprised about the second will that had been made?

Q. Yes, I am asking you if you were in fact surprised to find there had been a second will made?

A. Yes, yes.

COURT: That conversation was with Mr. Bell, wasn't it?

A. Well, that conversation was with Mr. Bell, and as I remember I told Bess that I was surprised at the contents of his last will, Mr. Smith's last will.

Q. In fact, you didn't know, I think you said this morning, that this second will had been made at all.

A. No.

Q. Until after Mr. Smith's death, when you found it in Mr. Bell's possession.

A. I knew nothing of it at all.

Q. After the plaintiff went back, away, from Chicago to California, or wherever she went, did you receive any communications from her?

A. None whatever.

Q. Or from Mr. Price?

A. None whatever." (Rec. pp. 415-417.)

The defendant testified that she knew of the letter, Exhibit 8, found at page 604, from Mr. Price to Jessie Carey Smith, but that this was the only letter that was ever given her or sent to her or of which she ever knew coming to her or Jessie Carey Smith after they went back; and that she never had any communication from the time they left Minneapolis on that trip, and was not told that the plaintiff had returned to Minneapolis, (Rec. pp. 415-19). She also testified:

"Q. Was the first that you knew that she was back in Minneapolis when she started the suit against you?

A. Yes, when I had this summons and complaint.

Q. Summons and complaint in the state court?

A. Summons and complaint brought to my house." (Rec. pp. 419-420.)

She also testified that she was present at, but took no part in, the conversation above mentioned except one remark which she made:

"A. I think I said just about as Mrs. Smith did. That when P. B. said, 'Dewey, I wish you would take these jewels and take care of them,' I said, 'No, P. B., they are not for me to take. Some time when Bessie feels that she can take care of them herself they are for her, and you had better put them in your safe. I don't want to take them.'

Q. And you didn't take them?

A. No." (Rec. p. 420.)

She then tells of a time when she went with Jessie Carey Smith to pay dressmakers' bills soon after she came back from her wedding trip. That P. B. Smith made her an allowance of \$50 per month after their marriage; that the maid, Emily, brought her some household bills when she and Peter B. Smith and little Donald were at breakfast together soon after they were married, and she proceeded to pay bills so far as she could that had been contracted prior to her coming there, out of her \$50 per month, then she said, (Rec. pp. 422-424):

"Q. Why did you do that, Mrs. Wallace?

A. Well, because we had had one scene at the breakfast table in regard to these bills which had accumulated on our wedding trip, and I naturally wanted no more scenes. And I thought possibly that things would straighten themselves out, but finally I found that they were accumulating a little bit too fast. In fact, Bess would come to me for money; not very much; but my allowance was \$50, and I was getting personal things for myself, and I found that I was going to get very much

behind. It was a matter of annoyance and worry to me, more especially worry because I didn't want to go on that way. And finally Arthur Smith was over at the house one night; we were on the porch, and I told him.

Mr. Hallam: I object to this as not responsive to the question.

Mr. Mercer: I asked her to tell how it came about.

A. This is how it came about: Arthur said, 'Dewey, you are doing a very great wrong about this in trying to protect Bess.' He said, 'The only thing for you to do is to get these bills and have it out with P. B.'

Mr. Hallam: If I understood—I don't understand this was in the presence of either Mr. Smith or the complainant.

A. No.

COURT: This is a conversation you had with Arthur?

A. This was a conversation I had with Arthur Smith.

Q. Was the plaintiff or Mr. Smith there at the time?

A. No, the plaintiff was not there at the time.

Q. The plaintiff was not there?

A. No.

Q. Was Mr. Smith there?

A. No.

Mr. Mercer: I simply want to show enough of it to show that Arthur Smith told her to go to P. B. after she had explained to him what the situation was.

COURT: That is the fact is it, that he told you to go to P. B.?

A. Yes.

Q. Now, go on and tell what happened.

A. I think that all blew over; and that is about all.

Q. You mean at that particular time?

A. At that particular time, yes. That was the only time when I was using my allowance.

Q. You quit using your allowance for that purpose?

A. Yes.

Q. You said you had one scene after you returned, at the breakfast table. What did you mean by that?

A. Emily brought some bills in to me, some

grocery and meat bills of some kind, or there was some bills that had not been paid and had been left at the house. Anyway, she brought them in to me and laid them at my plate. Some question arose as to what the bills were, and I passed them over to P. B. And then I think he sent for Bess to come downstairs.

COURT: He did what?

A. He sent for Bess to come downstairs to the dining room where we were. It was the first really stormy scene I ever witnessed in my life between them.

Q. You had nothing further to do with them after you passed over those bills to Mr. Smith?

A. No.

COURT: Did you hear what was said?

A. Yes, I was there.

Q. Tell us.

A. I don't exactly remember what was said.

Q. Do you remember whether there was anything said as to whether or not money had been furnished already to pay the bills?

A. Yes, I know that.

Q. Who said that?

A. P. B. said that. It was his habit to furnish money for the bills, before the 10th.

Q. He paid his household bills promptly, didn't he?

A. Well, yes, always; all his bills. He was very particular about his bills being paid before the 10th of every month, very punctilious about it.

Q. Now, Mrs. Wallace, you were present at the time when you and Jessie Carey went down to see about the dressmaker's bill and pay it?

A. Yes.

Q. You went with Jessie Carey down for that purpose?

A. Yes." (Rec. pp. 422-424.)

Defendant then tells of the fact that plaintiff's friend, Maud Marshall, had been on the stage and that plaintiff had gotten the idea that she would like to go and Bess asked the defendant to go with her about seeing if she could not help her get a position at a theater in Minneapolis, and then Mr. Smith asked defendant to go with the plaintiff to St. Paul to a theater and the following incident took place:

"We sat up near the front of the stage, and Mr. Smith sat next—Mr. Smith and Bessie next to me. And after the curtain went up I looked at P. B. and the tears were running down his cheeks. And I said, 'Bess, how can you do it?' And she shrugged her shoulders and tossed her head, and said, 'Look here, Dewey, I am going anyway.' That was the only conversation we had. We went home when the theatre was over."

(Record, p. 426.)

She then tells that the defendant soon went on the stage and left her children in the defendant's care and she had to attend to hiring different nurses and looking after the children and she had had no particular experience with children. She also tells about how Mr. Smith had had her keep a copy of a letter which she had written to Mr. Wright and which appears as Exhibit 7 of the Minneapolis depositions, but is defendant's Exhibit 8 at page 591, as appears from the bottom of pages 590 and 591. The letter and the envelope that were actually introduced were copies that she had kept from letters in Mr. Smith's handwriting, which came about as she testified at page 428, as follows:

"Now, how did you happen to write that document?

A. It was at a time when Mr. Smith was about at his wits' end to know what to do about Bess and what to do with her. And he wanted and hoped that Mr. and Mrs. Wright—Mrs. Wright was called Aunt Anna—Bess' Aunt Anna would take Bess and the children, and he wrote this letter; and one morning before he left the house he gave it to me and said, 'Dewey, I wish you would make a copy of this letter for me and file it away among some of Bess' bills.' I had a cubby-hole in the desk up in the den in which he had asked me to keep all of her receipted bills that he had paid, or that he had had me pay or had had Mrs. Jessie Carey Smith pay, bills that had come in. And so he said, 'Put that away with the rest of Bess' bills.' This letter was in his own handwriting.

COURT: That is, the original?

A. The original, yes. I copied it. I went into the den some time that day, copied it and slipped

it in the cubby-hole with these other letters and bills.

Q. That letter has been in our possession from the time that first action was brought. I think it was never returned to you, was it?

A. I gave you that letter when this first action was brought.

Q. You copied that letter so as to make this a copy of what Mr. Smith had written?

A. What is it?

Q. I say this is a copy of what Mr. Smith had written?

A. Yes.

Q. I think I have a typewritten copy of that that we can read faster. It was Mr. Smith who signed his own name to that original letter?

A. Yes, his letter was signed."

(Record, pp. 428-429.)

We had shown by Mrs. Wright that a letter had been received. She could not remember very much about it, but she had destroyed Mr. Wright's letters after his death in Ohio. This letter in which Mr. Smith partially opens his heart to her own family and says that the plaintiff's treatment has been such that she could not expect to be taken back into his family.

Now after this letter was written, Mr. Smith, then turned to her own father and the witness testifies:

"Q. Now, it was after this letter was written that Bess and the children went West?

A. Yes.

Q. Did her father come to the house with respect to arranging where she should go about that time?

A. Yes, he did.

Q. You saw him?

A. Yes.

Q. That is Mr. Ailes?

A. Yes, Mr. Ailes.

Q. And had a talk with Mr. Smith?

A. Yes.

Q. Did you hear all that conversation?

A. Yes, practically all of the conversation.

Q. What was the gist of it?

COURT: At what time was that now?

A. It was after this, after Mr. and Mrs. Wright

had written P. B. that they could not take Bess and the children. And he communicated then with Bess' father and asked him to come to the house, to find out if he would help, suggest something.

Q. Now, tell us what conversation you heard there between Mr. Smith and Bess' father at that time.

A. Well, P. B. told Mr. Ailes practically about what he has written to Mrs. Mright, and then said that he wanted, that he hoped Mr. Ailes would help him solve the solution of what to do with Bess and the children. And Mr. Ailes then said, or they agreed together, Mr. Ailes would give \$50 toward her support and P. B. would give \$50 toward her support. Mr. Ailes then suggested that Bess go to Tacoma. He either had a relative or very close friends in a Dr. and Mrs. Miller, and I believe he communicated with them and found that they would be willing to take Bess to board at their home.

Q. Was that the reason why they went up to Tacoma at that time?

A. Yes.

Q. Because her father suggested their going there?

A. Yes.

COURT: Was that the whole of the conversation now?

A. Was that all the conversation?

COURT: Have you stated all the conversation?

A. As far as I can remember. He was not there very long.

Q. Now, after that time you know of their being down in Southern California?

A. Yes.

COURT: In Southern California?

Mr. Mercer: I mean in California. Excuse me. Mill Valley. I got that into my head, that was Southern California.

A. Yes, in Mill Valley.

Q. You knew of their being in Mill Valley?

A. Yes.

Q. You and Mr. Smith at one time stopped off there to see them?

A. Yes, sir.

Q. Where had you been?

A. We had been in Southern California.

Q. And you stopped at the Prices?

A. No.

Q. Or was that before the Prices were married?

A. That was before they were married; before Bess had married. She was then living in Mill Valley. We stopped in San Francisco, and went over to Mill Valley, and P. B. saw the children and Bess there.

Q. And how long did you stay there at the house?

A. At their house?

Q. Yes.

A. I think P. B. was over there one afternoon, and I was ill and not able to go over the first afternoon that we arrived in San Francisco; and he expected to stay the afternoon and evening. But he left in the morning and came back about 4:00 o'clock that afternoon. And he said he would go over the next day if I was well enough. And I think that the next day when we went over P. B. brought Bess and the two children over to our hotel and took a room next to ours, and they were there all the time we were in San Francisco, about a week.

Q. After that were you in California after she had married Mr. Price?

A. Yes, one visit.

Q. You met Mr. Price there?

A. Yes."

(Rec. pp. 431-434.)

Counsel tried to get her to admit that she held up the knowledge of the death of Mr. Smith from the plaintiff and she undertook to tell him that she had not done so, but she tells Mr. Hallam (Rec., p. 447) that she had communicated through the Washburn-Crosby Company through Boston (Rec., pp. 447-50) and as the Court points out at page 459, it appeared that the telegram (page 598) was not sent until the 20th and the Court saw no special importance in it anyway—neither do we. She tells counsel (Rec., p. 454) that as the boys grew older and as Mr. Smith saw them but twice he seemed to grow away from them year by year and spoke of them less than he did when they first went away, and we

tried to admit a number of times upon the Record, p. 454, that Mr. Smith was fond of the boys, and the Court had no question about that as he stated. It is not necessary to go any further into that.

She said that Miss Clark was in the room when she talked with Bess about the engagement. In other words, to be sure that the Court understood the situation, His Honor asked the following questions, as appeared by the Record, pp. 490-1:

“Q. I wish you would repeat again the conversation you had with Mrs. Price on the porch after she had come back and ascertained that the will had not provided for her.

A. Yes.

Q. I wish you would repeat the conversation there at that time.

A. I think I was on the porch and Bess came out, and she said to me, ‘Dewey, are you going to give me anything?’ She said, ‘Dad has left me nothing. Are you going to give me anything?’ And I said, ‘Well, why, Bess—why am I called upon to do this, if P. B. didn’t think it best to leave you anything?’ As I remember, she said nothing more. Then she said, ‘Well, Dewey, we are poor, and we have got to go back, and we have no money to go back with,’ and she said, ‘I will have to have some money to go back.’ And I said, ‘Very well, Bess, I will see that you have money to go back.’ And I remember that she looked up and looked down the street, and she said, ‘I wonder when Ned is coming home.’ Oh, another thing: I said, ‘Bess, you don’t consider this note that P. B. left you and Ned, which will pay off the indebtedness on your house.’ Of course, the note was evidently he had sent her the money to build the house with. And she said, ‘No.’ And I said, ‘that is not money—you don’t consider the note money, really, do you, Bess?’ And she said, ‘No, I don’t.’

Q. That is all the conversation you recollect?

A. That is all the conversation I recollect.

Q. That covers the whole conversation between you and her touching the will, and touching what you were to do, and what she was to do?

A. We had no conversation about the will.

We had no conversation about a contract, because there was no contract. There was no understanding. She never mentioned the fact to me, as she says in her—as she says, that she asked me, that I told her I would send on as soon as the will was probated, I would send on her portion. There was never such a word mentioned. Not a word. I never dreamed of such a thing.” (Rec. pp. 490-1.)

The only rebuttal which plaintiff presents was her own testimony in which she admitted (Rec., pp. 493-5) that when she told the story about the defendants telling her of the engagement she had forgotten that Miss Clark was there until she had seen Miss Clark in court that day; that she had not seen Miss Clark for a great many years and was not a personal friend of hers, but that Miss Clark was a friend of defendant and had been invited to the Smith house because she was a friend of Mrs. Wallace and she could not quite tell then whether Miss Clark was present the night when plaintiff said that Mrs. Wallace was on the same bed with her she thought instead of being on the couch herself, but she did not deny the facts as presented by Miss Clark and the presumption is that when she remembered Miss Clark and heard the facts she must have remembered that as Miss Clark said they took place and must have then remembered that they did not take place as she claimed they did and as defendant said they did.

Argument on Appellant's Claims as to Facts.

1. Appellant says in her brief, page 1, that there were two branches to Mr. Smith's family, first, the defendant, and second, the complainant and her two sons. Not at all. He left only one family branch, as any man leaves who dies leaving a wife without children.

The foregoing details show that he was bound by neither law nor equity to either plaintiff or her children. He had more than discharged the duties of a stepfather,—she had been an unappreciative, silly sort of a girl who was unable to appreciate his liberality or unwilling to live with her own

relatives when he made his last will and when he died.

She had one divorced husband whom counsel describes in his brief as a successful medical practitioner, and who contributes to her boys (Rec. p. 237); she had one husband with whom she was living; her own father was alive and is alive yet; her two sons were with her and had been adopted by the husband with whom she was then living; and she had a father-in-law who was a dry goods merchant and who gave testimony in this case.

Evidently she preferred a life of ease and luxury and her own way as to whether she would enter matrimony or the stage or live with her own relatives, and, like most persons who have been too much indulged, was perfectly willing to take all that she could get out of Mr. Smith, and call for more under the pretense and afterwards claim that his generous and charitable nature had woven him into an obligation.

At the same time, we find that she had estranged him so that he appealed to her family to do something with her. He had opposed her going upon the stage, as we have pointed out, and at page 591 of the Record we find his own language in February, 1903, just when he wanted her to depart from him:

“* * It now becomes a question what to do with and for her and her children. The way she has treated me, I can hardly be expected to take her back into my home again, * * * Could you and your family find it in your hearts to take her and the children into your family * *? The way she has acted we could hardly think of taking her into our home and hearts again.”

Did He Love Her Then as a Daughter?

We find him calling in an old friend, so that he could have someone to whom he could open his heart and let it be known that the accusations which Bess was making against him were not true, and that he did not think he was obligated to support her. He wanted someone to know

the truth so he called in Mr. Lauderdale and his wife to supper and with tears in his eyes, strong man though he was, he laid before them for his own protection, his own conclusion as to his mistreatment by her and his disposition toward. (See Record, pp. 516-17). He told them,

“Mr. Lauderdale, there is something I want to talk to you about that nobody knows anything about; I haven’t talked to anybody about it and it is simply setting me nearly crazy; and that is in regard to the actions of Bess and the reports that she is circulating in regard to my treatment of her.”

Were those the actions of a daughter toward a father?
In speaking of what he had done for her, he said:

“* * * it has got to the point where I have got to draw a halt.”

Did he expect, then, to will her his property?

He told of his arrangement with her,—not to make a will, but to pay her \$200 or \$300 a month and pay the house rent and she should take care of the house and be in charge of it and pay the bills; he paid her the money and supposed that she was taking care of things for some months, when he began to received grocery bills and meat bills. He paid them and protested to her and she claimed excuses. This was after her husband, Donald, had left her. Mr. Smith said Donald was gambling and that she had taken things from the house twice and pawned them in order to get money for Donald. Then Mr. Smith said,

“It has got to that point where I have just simply got to stop; I will not submit to it any longer. She has told different parties in regard to what I was doing and what I was not doing, and it certainly is not fair to me that she should circulate those stories, and I have no defense at all. The whole gist of the matter is that I am going to stop; I am not going to do anything more for them. As long as the children are in my home, I will take care of them, but further than that I must absolutely stop.”

(Record, p. 517.)

Did he feel any obligations to her?

We find from the record and the evidence cited hereinbefore that at that time he had an outstanding will which made an allowance of \$5,000 to her and \$5,000 in trust for the boys. This was about the time he sent her away and, failing to get her own relatives to take her off his hands, had made her own father come to time with terms to contribute for one-half of her support; but the father loaded it all on to him, until she was married, when he cut off her allowance, and kept up one for the boys until the house was built and he had arranged to give the last \$2,000 on that and the boys had been adopted by the new husband, and they were all fixed happily in their own family as Mr. Smith was then fixed in his with the defendant and he changed his will, leaving them nothing except that note, which he left by an outside memorandum.

What principle is there in reason or justice that would take his property from his wife and give it to this woman?

2. Counsel suggests, on page 2 of his brief, that Mr. Smith referred to the plaintiff as his adopted daughter when he made his will in 1902, and in a letter which is quoted on page 2 of the appellant's brief and is claimed to be in that connection. Why should not Mr. Smith be glad that they were settled in their own home. He was a generous man and had helped build their home and he was then quitting regular contributions to the boys and had so arranged his affairs that they would not inherit from his estate by his will, which is found on page 587 of the Record and dated in January, 1906. But there certainly is nothing in the letter given there by counsel, which indicates any such contract as claimed. It is signed "Dad," but we have already pointed out that the evidence shows that she called him "Dad," and her own father "Papa."

Counsel suggests, on page 3 of his brief, that there was an equitable adoption admitted without resistance, in the defendant's oral examination. No reference is given to the

record in that regard on this point and in view of the fact that it is not correct, we call the court's attention to the fact that no error was specified in that decree for the Court's failure to find adoption, and we could not anticipate that such a question would be raised in order to have the record prepared accordingly; but we pointed out to the Court in the course of the trial, (Rec., p. 167-170), when this question arose, that there was no pleading that would warrant any proof of an adoption and objected to counsel's going into that matter with any such view. We pointed out in that connection that there was a written stipulation in the case to allow counsel a certain time to amend his bill if he wanted to claim adoption. This was not disputed by counsel and no adoption in fact or law was claimed by him and the court ruled at that time that the case would stand or fall upon the contract alleged.

Under these circumstances, of course, counsel is estopped to make any claim of real adoption; besides we showed by Jessie Carey Smith, as pointed out above, and by the plaintiff herself, that Mr. Smith had at one time talked of adopting her and that she and her mother did not allow it,—she wanted to inherit her father's mining properties in Alaska. Another evidence of putting money matters ahead of love, as she had a right to do if she wanted to do it. She wanted to inherit from her own father.

He had loaned to Mr. and Mrs. Price the last \$2,000 for their house and had taken their note dated October 15, 1906. He had cut her out of his will in January, 1906, and had quit contributing to her or the children some time along in that period. His letter, which enclosed to her the \$100, was December 14, 1916. He asked her to keep most of the \$100 toward furnishing the house and the rest for Christmas as coming from "Dada and Aunt Dewey." In other words, they did not treat defendant as if she were the wife of a grandfather, and Mr. Smith could not be "Dada" to both the boys and the plaintiff, in fact.

3. Counsel suggests, a page 3 of his brief, that Mr. Smith had ejected the husband from his home and contracted with her that all he had would be hers when he was gone. Again, he does not point to the record where any such contract can be found and we find that her story is very disconnected and indefinite; but we suppose she meant it to be to the following effect: that when she decided to get a divorce in the spring of 1907, she accepted a proposition which Mr. Smith had made the fall before, which possibly she meant us to believe was left open, if ever made, by which he would give her his all when he was ready to go if she would stay there and take care of him and the children, and two-thirds of it was to be for her boys and one-third for herself. It is not claimed that this proposition was changed from the time in October when she claims it was made; the evidence is undisputed that she and Mr. Smith both gave testimony in her divorce case and the Court in that divorce case found that she was to act as Mr. Smith's housekeeper for one year under an arrangement by which she was to earn the living for the family and give Donald a chance to practice medicine. In 1903 Mr. Smith's conversation of that transaction as given to Mr. Lauderdale was to the same effect,—he was giving her an allowance and she was to take charge of the house, pay the bills during the period after her husband left, when she claims she was acting as a faithful and dutiful daughter. The husband was gambling and she was sending him money which she got by pawning things from the house, and using the money that was given her for household expenses. Besides that and in about a year from the time she claims the arrangement was made, Mr. Smith had married the defendant to become his real housekeeper and had taken her to the house and showed her that he was not being properly cared for in his clothing and things of that sort. He had made the will of May 14, 1902, and within a year from the time she claims this transaction took place, the

defendant, with no knowledge of any pretended claim, had married Mr. Smith and was trying to shield the plaintiff from the enmity which she saw was likely to come when Mr. Smith would learn what the plaintiff had been doing in the way of money matters.

In addition to this, we find that her statement that he would give the property to the children at the time when Donald left, is not true. She did not then know that she had more than one child and did not discover it for some time, as testified to by Jessie Carey Smith, (Rec., p. 353). She was then intending to go to Donald when he could support her and she admits this, (Rec., p. 241). She was corresponding with him and did not make up her mind to get a divorce on account of what Mr. Smith had told her, but she found that her husband was in trouble again and she told Jessie Carey Smith that she had decided she would get a divorce from him. Jessie Carey Smith told her that if she had made that decision, she had better tell Mr. P. B. Smith about it, (Rec., p. 357). This evidence is undisputed.

Her story itself is extremely meager about this whole affair. She claims that she accepted his proposition, and gives nothing sufficiently definite that a court of equity could find anything to decree.

More than this, it is inconceivable that a person of her disposition would not have raised the question of having a right to be supported, or having a right to be treated as a daughter, or having a right to have the children treated as grandchildren, or supported by Mr. Smith, or to have her own support from him, had she had any such agreement. She would have raised the question or made protests upon it during his lifetime,—it is one of the thoughts that death and greed prompted.

She saw that he was trying to get rid of her and get rid of supporting the children, although he had loved the children as anybody would love two small boys that were being brought up with them; yet, she could not avoid seeing

the fact that he did not want to keep those boys indefinitely in his own home as a burden upon his new wife, and no true mother could expect him to do so. Her own relatives were not willing to take them, their own father was alive and she was not willing to let him have them, and her treatment of Mr. Smith was such that he could not keep her in his home longer; so they were sent away to live on his generosity with the supposition that her father was to pay one-half, until she married again when she was cut off; and, until he aided in building their home, when the boys were cut off from the regular contributions and the same year they were both taken from his will.

4. Counsel suggests that these people have been defrauded in ghastly form, upon the theory that Mr. Smith expelled the husband and father and agreed to take care of these children and her, (App. Br., pp. 3 and 4), and it is suggested by counsel that that stipulation is shown to a moral certainty by several unassailed creditable witnesses, (App. Br., p. 4); but no citation to the record is given in connection with that statement where those witnesses could be found, and we have yet to read in the record or to hear upon the trial, the testimony of a single witness outside of the plaintiff, making any pretense of any knowledge of such an agreement.

5. Counsel quotes from defendant's testimony, on page 5 of Appellant's Brief, to the effect that Mr. Smith seemed somehow to drift away from the boys as they grew older, and he saw less of them, and counsel seems to think that her testimony, pages 457-8, is inconsistent, and a retraction, —not at all. As we pointed out, on page 454 of the Record, we had tried to admit a number of times that Mr. Smith liked those boys and the defendant testifies that he was very fond of them and that they were handsome boys. And Mr. Smith's own treatment of the boys indicates either that he thought less of them or that he felt he had absolutely no obligations to them, for he quit his regular contributions

to them as soon as the opportunity presented itself. That did not keep him from liking the boys or wishing them to succeed or if he prospered he might some day aid in their education. But all of this is very far from any agreement, definite or otherwise, to do so. Counsel makes reference to where Mr. Smith had used the term "daughter" without saying "stepdaughter," for the plaintiff. A man of his experience would understand that if he used this term "stepdaughter" on various occasions it would arouse curiosity, and embarrass the family and particularly the stepdaughter. For people who travel from place to place, and engage in the affairs of the world, understand that those things are unnecessary and that they do not mean anything in particular, especially when she had refused to become his step-daughter, as admitted. On page 7 of counsel's brief, he refers to the defendant's testimony, (Rec., p. 483), and where he asks the defendant if she observed that Mr. Smith had called the plaintiff his stepdaughter and claims that it could not have been true that the defendant never gave much thought to that question and did not go into the matter with Mr. Smith of what relation his stepdaughter stood in; and seems to think it very strange that she did not become curious about the matter or that Mr. Smith never expressed to her anything about doing anything with the property matters; and then when she tells that Mr. Smith was a very reticent man (Rec., p. 452), and that he had never discussed such things with her, but that the children were often spoken of in a casual manner, then counsel says:

"* * * save as she confesses, she falsifies."

(App. Br. p. 9.)

He gives us no reference to the record as to any false testimony and he presented no such testimony in the case. There is not a witness nor letter nor a circumstance in all of the evidence in this case which indicates that Mr. Smith ever understood that he had any obligation to these people. aside from the bare and uncertain assertions of the

plaintiff. There is no evidence at all in the record by plaintiff or any of her witnesses or by any documents or by any circumstances of any property left to this defendant for the plaintiff or her children, in any particular amount or at all. The plaintiff says that the defendant told her, when she became engaged, in a very dramatic manner, that she would not come between her and Mr. Smith, that after Mr. Smith's death, the defendant told her that they would send her share for herself and the children.

We produced a witness who was present at the time the conversation about the engagement, Miss Clark, whose testimony appears at page 341 and she tells us that no such thing happened; that there was not any such talk except that they were told about the engagement and that the other dramatic features did not take place; appellant takes the stand in rebuttal, page 493, and says that she remembers that that witness was there, but offers no explanation as to any error in the testimony of that witness, except that she disagreed as to which bed, in the same room was occupied.

Besides, we have the evidence of the defendant that no such thing was true. Beyond this, we find that within a few weeks from the time this alleged conversation took place, with the defendant, that Mr. Smith made the will on May 14, 1902, which shows that he had absolutely no such understanding (Rec. p. 585. She tells us that the morning after the engagement Mr. Smith had informed her of the engagement and that he had modified the contract so that she and the children would have two-thirds instead of one-third.

The testimony of defendant is to the effect that she had no conversation with Mr. Smith about his property until the evening following the engagement, which was the evening of the same day when plaintiff claims that the modification was made, and that Mr. Smith absolutely said nothing about defendant having any interest whatever or any

claim upon his estate; but told her that he only had about \$40,000 (Rec. p 470), and Bess and children would probably go.

It would not take much figuring to show that if he was compelled to contribute \$100 a month for three or four years and \$50 a month to the children in order to give them a home, because the father did not live up to his portion of the subscription, and then gave them \$2,000 to complete their house, he would be getting close to the limit of \$10,000 or one-fourth of the estate which he had when he married defendant; but never did he indicate any understanding that he was required to do this, but only that he did it at generosity. His prediction that she would marry came true.

Was there any wonder that Jesse Carey Smith understood that he was simply caring for plaintiff because she had no home, or that he quit as soon as she had another means of support?

6. On page 10, counsel makes a quotation from a letter *rejected by the court*, which letter is found on page 605 of the Record, as to the views of an outside party; that letter is no part of this record, for the purposes of treating it as evidence. Error is assigned for not allowing it in evidence. It does not purport to have been written by anybody's authority. There is no evidence that the defendant ever heard of it; but that letter indicates that it is the opinion of the writer and another person and apparently Mr. Hartzell also thought that they would have no faith in predicting a successful outcome on a contingent fee of any case brought against the defendant because they thought Mrs. Smith could not be cajoled or threatened into making a settlement of the case. This letter was written on the 26th of June, 1909, and the judgment for the defendant was concluded on the 30th of June, 1909 (Rec. p. 604). The letter points out to her that she had put herself beyond the pail of sympathy of the defendant by attempting to break

the will. This witness tells her that he understood that Mr. Smith intended that some provision should be made for the boys. This letter is not in evidence and we object to its being used in this way; but if it had been placed in evidence, it would have amounted to nothing, or if we had known that Mr. Brown had ever written such a letter, we could have asked him to explain what he meant by it. The fact is that he is an outsider and she was trying to appeal to him, when her case was pending, to force a settlement as would appear from this letter, if it were in evidence; but under oath, Mr. Brown had stated, at page 512, that when he witnessed the will of Mr. Smith that left everything to the defendant, that Mr. Smith stated *that that was his will*.

Counsel calls attention to the evidence of Mr. Hartzell to the effect that Mrs. Smith had said (Rec. pp. 133-36) that she thought the leaving of the whole estate to her was a matter of leaving it to her honor to take care of the boys, and that she proposed to see that they had a good schooling, but that she could not do anything for Bess. This does not say that Mr. Smith had any arrangement with her and Mr. Hartzell, cousin though he was of the plaintiff, by marriage, admits that there was nothing said about any definite arrangement (Rec. p. 141). The defendant does not remember any such conversation and there was nothing said at the time that impressed General Wilson as being of any consequence. It is true that Mrs. Hartzell, who is the actual relative of the plaintiff, says that the defendant told her she intended to carry out Mr. Smith's wishes regarding the boys, but what those wishes were she did not say that the defendant said nor that anybody said and nobody knows, except that Mr. Smith said at one time that if he prospered as he hoped to, that he would provide for their proper education, not that he had provided for them nor that he was bound to provide nor that he had agreed to provide.

Then counsel lays stress upon the testimony of Mrs. Hartzell to the effect that Mr. Smith said he would not have insisted upon her getting a divorce from the doctor, if he had not intended to provide for her and the boys and that he felt toward the boys as if they were his own and that he should always provide for them. Of course, there is nothing definite about this, except that he urged Bess to get a divorce; but she says herself that when he urged her she refused (Rec. p. 196). And we have the undisputed fact that she finally made up her own mind to leave Donald because of his further trouble and the fact that he was in jail and made up her mind independent of the defendant. Jessie Carey Smith tells of the occasion; how she urged her to tell Mr. Smith (Rec. p. 357) and the plaintiff admits it for want of denial (Rec. p. 240).

Then another relative, Mr. Price, Sr., testified that Mr. Smith said he wanted the boys to have a good education, and that if he lived he would see that they had such an education and means to go into business, and if he died, they were well provided for. Assuming this to be true, it might mean many things. It might mean that since they were adopted into Mr. Price's family, and since they had a home which Mr. Smith had aided in building and he had left a note to the mother and father, that the boys would be well provided for. It may have been true at the time that the \$5,000 was in his will for them when this conversation took place, if it took place at all, but if Mr. Smith said that at all, he evidently had in mind that if he continued to live, he would aid the boys just as he evidently had in mind when he spoke to Mrs. Hartzell, if he spoke to her as she claims, that

“I shall *at the proper time* provide for their suitable education.”

In other words, the indication of the testimony of Mr. Price and Mrs. Hartzell was to the effect that Mr. Smith had hoped that in the future he would help out the boys in their

education and the testimony of Mr. Hartzell would be to the effect that what Mrs. Smith said was that that matter had been left to her honor and she proposed to see that they had a good schooling; which could only mean, in the best interpretation for the plaintiff, that Mr. Smith felt kindly toward those boys up to the time of his death and if he lived he had expected to aid them in their education if they proved worthy of it. Nothing more could be expected if he had that inclination, for he was too smart a man to want to educate mere chumps; and all Mrs. Smith's statement could mean in the light of the fact, was that she had discovered after the death that the \$5,000 which had originally been provided for the boys, had been removed from Mr. Smith's will without her knowledge and that she had no obligations in the matter; but that she thought she knew Mr. Smith's wishes in his lifetime, and that if the boys should prove themselves worthy, she might feel the same way. Certainly, there is nothing definite in this testimony or anything to indicate that the testimony of the defendant to the effect that she did not know of the second will and had made no arrangements with Mr. Smith about the property matters, was in the slightest way inconsistent.

7. Counsel suggests that no one has ever yet had the courage to intimate (App. Br. p. 12) that the defendant can be exonerated if Mr. Hartzell's testimony is true.

"for, if so, our laws would be in league with malfeasance."

He then assumes, as he does in many other places in the Record, that fragmentary pieces of evidence showing good will upon the part of Mr. Smith or the defendant, toward those boys, placed upon them legal obligations which they were required to carry out.

Now, let us see what Mr. Hartzell's testimony means in this connection, if taken as true and accurate. When we came to cross-examination, we asked him the questions and received the answers following:

“Q. But she didn’t say that Mr. Smith had delegated any matter of taking care of the children to her, did she?

A. I think I have repeated everything that was said between us.

Q. All that you recollect of being said in the slightest way?

A. Yes.”

Rec. p. 142.)

That is Mr. Hartzell’s interpretation of that conversation while the defendant says that she had no recollection whatever of having ever made such a remark, and that she never had any arrangement with Mr. Smith nor he with her to have any obligation whatsoever respecting the plaintiff or her children.

8. We do not quite understand what counsel means by his “Gibraltar” witnesses who

“* * * reveal the very heart of truth as it is in God,”

or that we are precluded by our acts and good words in this record; and we call attention to the fact that on page 439 we objected to the cross-examination where a witness was asked to pass upon the creditability of a witness while the defendant says that she did not make the remark as credited to her by Mr. Hartzell, but she did say to him that

“P. B. had given me the greatest compliment that a husband can show his wife by leaving his property to me.

Q. Did you say anything about the care of Bess and the children?

A. No; because I had no care for Bess and the children.

Q. You had no care of them?

A. There was no care put upon me for Bess and the children. * * * P. B. never left me the care of Bess and the children.”

Rec. pp. 441-2.)

The defendant said that she remembered no conversation whatever with Mrs. Hartzell, although she had tried

to remember if any conversation took place respecting these matters and she testified (Rec. p. 442):

“I didn’t make any remark that I understood P. B.’s wishes were such that I had any care or responsibility, financial or moral or physical, any responsibility of Bess or the children.”

And the witness testified at page 445, that she never authorized Mr. Brown to speak for her at all in the letter marked “Exhibit F.”

9. Counsel seems to think it strange, on page 14 of his brief, that the defendant was unable to tell him what explanation there was as to why Mr. Smith had cut out any allowance in his new will (Rec. p. 460), and that it was a surprise to her to hear that there was a will so cutting it out, (Rec. pp. 460, 477). She tells how Mr. Bell had given her the new will at the offices of the company after Mr. Smith’s death and how she was surprised to find that there was a will which left everything to her as she had supposed that the \$10,000 provision was still in the will, (Rec. pp. 410, 477). Mr. Bell had died before this case was prosecuted, and we cannot get his evidence as to that, but her evidence is undisputed upon it. Mr. Cook had died and we could not get his evidence as to what Mr. Smith said about the new document which left everything to defendant, being Mr. Smith’s will, but that will was admitted to probate and of course that concludes the question as to what was to be done in fact. Counsel admits in his brief, pages 14-15, that Mr. Smith may have thought his obligations had ceased and says that Mr. Smith intended:

“The truth is, Smith *intended* to provide and he *did* provide. It is *presumed* that he did, and it is *clear* that he did.”

This is the sort of claims made in this brief. No citations to the record of any such evidence and there is no evidence that Mr. Smith ever made the slightest provision in any will or to be added to any will, except the provision

in the will of May 14, 1902, which he withdrew as he had a right to do, under the laws of Minnesota, (Revised Laws, Minn. 1905, sec. 3659) :

*"Who may make a will—How executed—*Every person of full age and sound mind, by his last will in writing, signed by him, or by some person in his presence and by his express direction, and attested and subscribed in his presence by two or more competent witnesses, may dispose of his estate, real and personal, or any part thereof, or right or interest therein; and the words 'every person' shall include married women."

Revised Laws, Minn., 1905, Sec. 3659.

In speaking of the complainant's marriage to Dr. MacLean, counsel says on page 18 of his brief :

"Smith was not a Pharisee. The junior offense was promptly condoned by the senior offender."

We do not know just what is meant by that, but there had been insinuating remarks made throughout the trial, and in order to avoid any controversy upon that question, we challenged counsel to know whether he expected to undertake to claim that Mr. Smith's home was not run on a high plan and offered to introduce evidence of the fact that it was run on such plan; and counsel admitted then that he would not make any question about anything of that sort. It was never understood by anybody at that trial that the facts warranted the casting of any aspersions upon Mr. Smith. There is then no occasion for such remarks as made at page 28 of counsel's brief. Counsel seems to hold that the plaintiff became a subordinate member of Mr. Smith's family after he married the defendant, (Appelalnt's brief, page 30), and that the servant did not think the complainant felt very much at home after that. Counsel's comments, page 32 of his brief, are as follows:

"The defendant says this disinheritance is a mystery. We say it is plain. We say it is not the mysterious duplicity of him who loved, but the later duplicity of her who coveted. There can

be no fact more certain. No doubt Smith mentioned the care of his family, in some way, in those four last years when he and the defendant were alone in Minneapolis. No one can doubt it, but the defendant says 'No.' 'Never, never, no.'” and page 33:

“No doubt Smith told the defendant more than once in those last four years when they two were alone, that he wished to carry out his agreement with Bess, and no doubt in order to get the last will as it was, the defendant pledged two-thirds as easily as two cents.”

This is more of the sort of statements upon which counsel asks the court to make a decree. Not facts, but the supposed theory of a highly ambitious litigant worked into frenzy by the nervous strain of indiscriminate advocacy.

10. At page 32 of counsel's brief he charges the defendant with concealing Mr. Smith's death from the plaintiff until the day of his burial, and charges her and her "confederate" with giving flatly opposite excuses and then says that they had no excuses for that disgraceful neglect.

Now, it will be noted in this connection that Jessie Carey Smith testified at page 363 that she had a talk with the plaintiff after the plaintiff had examined the will, and this was that talk:

“She said that she was very much disappointed at the way things had been left; and I said to her, 'Well, Bess, I don't suppose you expect P. B. to leave you anything.' Well, she said, she thought he might have remembered the boys.

COURT: What was that?

A. Might have remembered the boys in his will.”

(Rec. p. 363.)

And plaintiff herself did not like to admit, (Rec. pp. 295-7) that she knew the details about the money matters at the time they went back after the funeral and anchored at Chicago, but she did know that her husband and Mr. Smith were in these communications; and she knew that the \$114 which Jessie Carey Smith put up for them to go to Califor-

nia from Chicago was Mrs. Smith's money, and that when they got the money that they took the train for Chicago, and that she had talked over matters with counsel in a general way when she was in Minneapolis for the funeral (Rec. pp. 302-9); she admitted that Mr. Smith himself had strict regard for his own word (Rec. p. 306), and the judgment roll in the former suit was conceded to be in evidence at page 308.

We cannot see how this has any bearing upon the merits of this case. Everybody knows that a succeeding wife, or the second, third or fourth in any family does not hunt up the relatives of her predecessors to invite them into mourn with her over the loss of her husband after they have been separated for a number of years and when that particular relative has so treated the husband as to make it necessary for him to beseech her family to relieve him of her. But if this were an important point, it is shown beyond any question in the record, by the testimony of the defendant, that she did not particularly remember the incidents of the matter, but she did know that there was a telegraph strike, and that she left everything in the way of notices to Jessie Carey Smith. And her testimony also to the effect that she had to get the private wire of the Washburn-Crosby Company, through Boston, to get the news of the death of Mr. Smith to Minneapolis, and the testimony of Mr. Gibson that he and the officials of the Washburn-Crosby Company office, through the aid of the president of a railroad company, were enabled to find the body of Mr. Smith and get information back and forth to the defendant, by the use of a private dispatch wire of the president of the railroad company. This might very well have happened at that time, and a message might have been sent as counsel suggests four days later, but these parties were not concerned particularly about this fact at the time as to whether the strike went west of Minneapolis or not. The matter was left to Jessie Carey

Smith to notify the other people and she had stood by plaintiff and Mr. Smith in their various squabbles until it was quite natural that she should think that a telegram for them after the funeral with a letter of details would answer. Nobody suspected that this plaintiff would desire to come on to Mr. Smith's funeral after the way she had treated him in his lifetime.

11. Finally counsel says that no final judgment was ever entered on the demurrer in the suit and that an appeal was begun and dismissed. If he would turn to the Record, at page 90, he would find the judgment sustaining the demurrer and if he would turn to the Record, at page 70, he would find that the order which sustained the demurrer gave the plaintiff twenty days to file an amended complaint if she should be so advised, and also turn to the Record, pages 74-82, he would find a proceeding brought to extend that time, after the appeal had been abandoned and that the Court refused to make further extension upon the showing made. If counsel will turn also to page 539 of the Record, he will find that the clerk in charge of the judgment roll was sworn and testified that there was no transcript of record in that case, that is, of any testimony.

12. So that when the case is ended, there is absolutely no outside evidence to carry out the theory of appellant's statement in his brief of any agreement or of any stipulation with the defendant or of any adoption such as claimed or that Mr. Smith ever shunned any duties which he had to the plaintiff; but upon the other hand, it is a plain, clear attempt of a benefactress stranded in his home with the dissipations of a husband, whom her own father, and not stepfather, allowed her to meet and marry, and who had been given shelter by the charity of Mr. Smith, and he was fond of the boys, and who at one time provided for them in his will, but after having spent substantially the amount of the provision that he had in mind concluded that the man to support her was her husband, and the person to

support the boys was the adopted father, Mr. Price; and that his own estate should go where the law would place it, either with, or without, a will, to his own wife.

I.

RES ADJUDICATA.

What Pleadings Necessary.

It is the rule of the Minnesota Supreme Court (as laid down in an action where a demurrer was interposed to an answer to a plea of former adjudication) that:

“The plaintiff claims in support of his demurrer to the portion of the answer quoted that it is insufficient because it does not set forth in detail the facts that were alleged in the complaint in the first action, so that the Court may decide by comparison whether the facts claimed in the two actions were the same; that the allegation of the answer to the effect that the facts in the two cases were identical is a conclusion, and not an allegation of fact. The claim is without merit, for the answer alleges the ultimate facts to be proven on the trial, viz., that the facts set forth in the complaint in this action are the same facts alleged in the complaint in the former action, in which there was a judgment on the merits dismissing the action. These ultimate facts constituting the former adjudication are properly alleged, in form and substance, in the answer.”

Whitcomb v. Hardy, 68 Minn. 265-267 (71 N. W. 263.)

The above was a case where fraud and conspiracy were charged.

Federal Rule. It is the rule of pleading, as declared in Lindsley v. Union Silver Star Minn. Co., 115 Fed. 46-7 (9 C. C. A.) that:

“A plea of former adjudication is sufficient if it alleges that the former action was between the same parties, and presented the same cause of action, in a court of competent jurisdiction, and that the judgment of the court was upon the merits of the case. 9 Enc. Pl. & Prac. 620, 621; Gould v. Railroad Co., 91 U. S. 526, 529, 23 L. Ed. 416.”

This answer complies with this rule.

The Court had jurisdiction in Minnesota to decide whether the Probate Court was the proper one.

When it is alleged, as here, that the court which rendered the judgment was one of general jurisdiction, as was done here, that is sufficient, without setting out specific facts or steps.

Art. 6, §§ 1, 4, 5, Constitution Minn.

Agin v. Heyward, 6 Minn. 110.

State v. Bach, 36 Minn. 234.

Lamar v. Micou, Admr., 114 U. S. 218.

Gapin v. Page, 18 Wall. 350.

The answer sets out that the Minnesota action was brought, and a judgment rendered by the District Court of the State of Minnesota, Fourth Division, as an equity case, and that that court was one of general jurisdiction.

A. Such court is the constitutional court of general jurisdiction in Minnesota.

Article 6, Section 1, of the Constitution of Minnesota, reads as follows:

“The judicial power of the state shall be vested in a supreme court, district courts, courts of probate, justices of the peace, and such other courts, inferior to the supreme court, as the legislature may from time to time establish by two-thirds vote.”

Article 6, Section 4, provides:

“The state shall be divided by the legislature into judicial districts * *. In each judicial district, one or more judges, * * * shall be elected,” etc.

Article 6, Section 5, provides:

“The district courts shall have original jurisdiction in all civil cases, both in law and equity, where the amount in controversy exceeds one hundred dollars,” etc.

This provision has always been held to give general jurisdiction to the district court.

Agin v. Heyward, 6 Minn. 110 (53).

State v. Bach, 36 Minn. 234.

B. Of this law and these decisions, this Court must take judicial notice.

In *Lamar v. Micou*, Admr., 114 U. S. 218 (L. ed. 223), the Supreme Court said:

“The law of any state of the Union, whether depending upon statutes, or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof. *Owings v. Hull*, 9 Pet., 607; *Pennington v. Gibson*, 16 How., 65; *Drawbridge Co. v. Shepherd*, 20 How., 227 (61 U. S., bk. 15, L. ed. 896).”

C. The general pleading is sufficient in such courts.

With reference to pleading jurisdiction to render judgment of such court, there certainly can be no doubt upon this record. The plaintiff sought both courts and entered them of her own volition and litigated the Minnesota case to judgment and that judgment is in this record, and has not been attacked by any means whatever, collaterally or otherwise, by either party.

In *Galpin v. Page*, 18 Wall. 350, the Supreme Court had under consideration a case going up from the Federal Court in California; there was a question of whether a commissioners' sale, had under a state district court proceeding to wind up a partnership, was valid. That title was drawn in question by the question of the validity of that sale and the state decree upon which it was founded.

Through Mr. Justice Field it is said:

“It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly. All intendments of law in such cases are in favor of its acts. It is presumed to have jurisdiction to give the judgments it renders until the contrary appears. And this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The former will generally appear from the character of the judgment, and will be determined by the law creating the court or prescribing its general powers.”

The court had the right to say that there was no equity to be exercised in the jurisdiction; but, as seen later, the Probate Court had to decide claims.

Plaintiff is Barred from Recanvassing This Matter in This Court.

This question will be divided for discussion into the following propositions:

1. By the decisions of the Federal Supreme Court, and this court, the law is settled that this court, upon this question must give to the Minnesota case the same effect as it would be accorded in Minnesota; therefore, the test of its conclusiveness must be had by the decision in Minnesota.

2. By the decisions of Minnesota, the judgment rendered there would have prevented a recanvass of the same transaction, even though different evidence or additional arguments could be produced, or additional pleadings needed.

1. *The Federal Courts give the same effect to the Minnesota case that the Minnesota courts would give.*

Cheever v. Wilson et al., 76 U. S. 108 (604);

Hancock Natl. Bank v. Farnum, 176 U. S. 638 (619);

Tilt v. Kelsey, 207 U. S. 42 (L. ed. 95);

Fauntleroy v. Lum, 210 U. S. 230 (1039).

In Cheever v. Wilson, 76 U. S. 108, it is said:

“The constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana. Const., Art. 4, Sec. 1; Stat. at L., 122; D’Arcy v. Ketchum, 11 How., 175. ‘If a judgment is conclusive in a state where it is rendered, it is equally conclusive everywhere,’ in the courts of the United States. 2 Story, Const., Sec. 1313; Christmas v. Russell, 5 Wall., 302 (72 U. S. XVIII., 478).”

Mr. Justice Brewer quotes the Constitution and statute and states the effect in Hancock Natl. Bank v. Farnum, 176 U. S. 640 (619) as follows:

“The plaintiff says that the decision of the supreme court of Rhode Island denied it a right

given by § 1, article 4, of the constitution of the United States, which reads: 'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof,' and the following statute passed in pursuance thereof, to-wit, Revised Statutes, § 905:

'The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and indicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.'

The plaintiff's contention that these federal provisions required a decision different from that made by the state court was distinctly presented and ruled against. The jurisdiction, therefore, of this court, is clear. It may examine and inquire whether any right secured by these provisions was denied by the state court, though if it finds that no such right was denied, the judgment will have to be affirmed, no matter what may be the opinion of this court as to the correctness of the ruling as a question of general law.

The constitution declares that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, and that congress may not only prescribe the mode of authentication, but also the effect thereof. Section 905 prescribes such mode, and adds that the 'records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken.'

Such is the congressional declaration of the effect to be given to the records and judicial proceedings of one state in the courts of every other state. In other words, the local effect must be recognized everywhere through the United States.

What, then, is the faith and credit given by law or usage in the courts of Kansas to a judgment against a corporation? What is the effect of such a judgment as there established? This is a question not answered by referring to general principles of law, by determining what at common law was the significance and effect of a judgment, but can be answered only by an examination of the decisions of the courts of Kansas."

In *Tilt v. Kelsey*, 207 U. S. 42 (L. ed. 95), Mr. Justice Moody says:

"When, therefore, we come to consider what faith and credit must be given to these judicial proceedings of New Jersey, we must first ascertain what effect that state attaches to them. The statute enacted to carry into effect the constitutional provision provided that they should have, in any court, within the United States, such faith and credit 'as they have by law or usage in the courts of the state from which they are taken.' Act May 26, 1790 (1 Stat. at L. 122, chap. 11), now § 905. Rev. Stat. (U. S. Comp. Stat. 1901, p. 677). They can have no greater or less or other effect in other courts than in those of their own state. *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604; *Board of Public Works v. Columbia College*, 17 Wall. 521, 21 L. ed. 687; *Robertson v. Pickrell*, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506."

The case of *Fauntleroy v. Lum*, 210 U. S. 230 (L. ed. 1039) grew out of a case on cotton futures.

The action was brought in Mississippi on a Missouri judgment. Mr. Justice Holmes said:

"This is an action upon a Missouri judgment, brought in a court of Mississippi. The declaration set forth the record of the judgment. The defendant pleaded that the original cause of action arose in Mississippi out of a gambling transaction in cotton futures; that he declined to pay

the loss; that the controversy was submitted to arbitration, the question as to the illegality of the transaction, however, not being included in the submission; that an award was rendered against the defendant; that thereafter, finding the defendant temporarily in Missouri, the plaintiff brought suit there upon the award; that the trial court refused to allow the defendant to show the nature of the transaction, and that, by the laws of Mississippi, the same was illegal and void, but directed a verdict if the jury should find that the submission and award were made, and remained unpaid; and that a verdict was rendered and the judgment in suit entered upon the same. (The plaintiff in error is an assignee of the judgment, but nothing turns upon that.) The plea was demurred to on constitutional grounds, and the demurrer was overruled, subject to exception. Thereupon replications were filed, again setting up the constitution of the United States (art. 4, § 1), and were demurred to. The supreme court of Mississippi held the plea good and the replications bad, and judgment was entered for the defendant. Thereupon the case was brought here."

And again:

"Whether the award would or would not have been conclusive, and whether the ruling of the Missouri court upon that matter was right or wrong, there can be no question that the judgment was conclusive in Missouri on the validity of the cause of action. *Pitts v. Fugate*, 41 Mo. 405; *State ex rel. Hudson v. Trammel*, 106 Mo. 510, 17 S. W. 502; *Re Copenhaver*, 118 Mo. 377, 40 Am. St. Rep. 382, 24 S. W. 161. A judgment is conclusive as to all the *media concludendi* (*United States v. California & O. Land Co.*, 192 U. S. 355, 48 L. ed. 476, 25 Sup. Ct. Rep. 266); *and it needs no authority to show that it cannot be impeached either in or out of the state by showing that it was based upon a mistake of law.*"

The judgment on demurrer is a bar rule in Minnesota.

In *State of Wisconsin v. Torinus*, 28 Minn. 175, in a second action growing out of a sale of logs in Wisconsin, and the general rule is laid down in the language of Judge Mitchell, as follows:

"The doctrine of *res adjudicata*, or estoppel by judgment, as it is sometimes less accurately termed, is a rule of law founded on the soundest consideration of public policy. It means that if an action be brought, and the merits of the question be discussed between the parties, and a final judgment be obtained by either party, the parties are concluded, and cannot again canvass the same question in another action. It is founded upon two maxims of the law, one of which is that 'a man should not be twice vexed for the same cause,' the other that 'it is for the public good that there be an end of litigation'; and it is undoubtedly true that if there be any one principle of law settled, it is that whenever a cause of action in the language of the law, '*transit in rem adjudicatam*,' and the judgment thereupon remains in full force and unreversed, the original cause of action is merged and gone forever. After judgment on the merits a party cannot afterwards litigate the same question in another action, although some argument might have been urged on the first trial that would have led to a different result. Such a judgment is final and conclusive, not only as to matters actually decided, but as to every other matter which the parties might have litigated and had decided as incident to and essentially connected with the subject-matter of the litigation as the facts then existed. The discovery of new evidence, not in the power of the party at the former trial, forms no exception to the rule. The doctrine is so just, and so necessary to the peace and good order of society, that we have no desire to either modify it or unreasonably limit its application."

In *Lumatainen v. St. L. River, etc. Co.*, 119 Minn. 238 (137 N. W. 1099), this rule was applied even though the pleading was so framed that all the facts were not brought out. The answer denied the allegations and pleaded a former judgment as a bar. The Minnesota court reviews its former decisions, including the *Torinus* case and Mr. Justice Field's opinion in *Stark v. Starr*, 94 U. S. 477, and some Federal cases, Justice Field stating in said case:

"In the bill, the complainant sets up substantially the same matter, though with greater fullness

and detail, which was originally averred in the first suit brought by himself and his brother, and omitted in the amended bill in that suit upon the election required by the court; and also claims that the defendant is estopped by his acts from asserting title to the premises.

The first question presented for our determination is, whether the complainant is concluded upon that matter in the present suit by reason of the proceedings and decree in the first suit. While that suit was pending, the complainant acquired the interest of his brother. It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs or both, *all the grounds upon which he expects a judgment in his favor*. He is not at liberty to *split up his demand and prosecute it by piecemeal*, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be *presented in a second suit, if the first fail*. There would be no end to litigation if such a practice were permissible."

Stark v. Starr, 94 U. S. 477.

And again at p. 245 of the *Liimatainen* case:

"The complaint in the second action states but a single cause of action—such is manifest from the mere reading of the complaint, and the plaintiff does not contend otherwise—and yet thereunder would be provable every allegation of the complaint in the former action and the cause of action alleged in the second complaint would thereby be sustained. This alone, we think, demonstrates that the cause of action alleged in the two complaints is identical, etc."

Again supporting this rule, is *McKnight v. Mpls. St. Ry. Co.*, 127 Minnesota, p. 207 (149 N. W. 131), Oct. 23, 1914:

Such then is the rule of the Minnesota court. The cause of action, the adjudication and the substance of the complaint are the same. The same alleged agreements; the same alleged trust; the same alleged violation.

The judgment on demurrer has the same effect as if upon the merits.

This judgment upon this demurrer to the complaint is

equivalent to a trial of the issues and a finding of the facts as claimed.

Carlin v. Brackett, 38 Minn. 307.

Dohs v. Holbert, 103 Minn. 283.

N. P. Ry Co. v. Slaght, 205 U. S. 129.

In the Carlin case it is said:

"This judgment was upon the merits of the action as presented by the complaint and admitted by the demurrer, and is as effectual as if there had been a verdict upon the same facts, for they are established by way of record in either case."

The Dohs case says:

"The order sustaining the demurrer in the first action was upon the merits. Day v. Mountain, 89 Minn. 297, 94 N. W. 887; Carlin v. Brackett, 38 Minn. 307, 37 N. W. 342. In the second action the court determined that the matter was *res adjudicata*. The appellant was privy to the actions of Straight, who prosecuted the actions on his behalf (Dunham v. Byrnes, 36 Minn. 108, 30 N. W. 402) and is therefore bound by the judgments rendered therein to the effect that the assignment of the policy was not a fraud upon the creditors of Holbert and was not a transfer of non-exempt property."

In the N. P. case the U. S. Supreme Court said:

"It is well established that a judgment on demurrer is as conclusive as one rendered upon proof. Gould v. Evansville & C. R. Co., 91 U. S. 526, 23 L. Ed. 416; Bissell v. Spring Valley Twp., 124 U. S. 225, 31 L. Ed. 411; 8 Sup. Ct. Rep. 495; Freeman, Judm. Sec. 267."

Many other courts might be cited, but unnecessarily, for the rule is as undoubted as it is valuable.

PRACTICE.

Under Section 4128 of the Revised Laws of Minnesota, 1905, we find the grounds of demurrer expressed as follows:

"Demurrer to Complaint—Grounds—Within the time allowed by law for answering the complaint, the defendant may demur thereto if it shall appear therefrom either:

1. That the court has not jurisdiction of the defendant's person or of the subject of the action.

2. That the plaintiff has not legal capacity to sue.

3. That there is another action pending between the same parties for the same cause.

4. That there is a defect of parties, plaintiff or defendant.

5. That several causes of action are improperly united.

6. That the facts stated do not constitute a cause of action." (5232.)

This section was in force at the time the former action was brought. The grounds of the demurrer were as follows:

"Comes now the defendant in the above entitled action and demurs to the complaint of the plaintiff herein upon the grounds that it appears therefrom:

1. That this court has no jurisdiction of the subject of the action.

2. That the plaintiff has not legal capacity to sue.

3. That there is a defect of parties plaintiff in that Donald MacLean should be made a party plaintiff therein.

4. That the facts stated in said complaint do not constitute a cause of action."

In line with the common practice on demurrers in Minnesota and elsewhere, it was the duty of the defendant to demur upon all of the grounds that she had irrespective of consistency, and it was the duty of the court to pass upon all the grounds of the demurrer or upon such of them as it considered advisable to pass upon. If it held that the demurrer was good from the standpoint of every ground as the defendant pleaded, of course that left the matter in the best shape for it would conclude, if possible, all the action as it was then brought and would dispose of the merits in case the technical defects were remedies. The defendant argued only the merits as the evidence of Judge Lancaster shows, but the court simply rendered a general decision.

This it had a perfect right to do, as a court is not required to point out the grounds upon which it sustains the demurrer in particular.

In 31 Cyc. 308, the rule with respect to demurrer upon more than one ground is stated in the following language:

"All the grounds of demurrer should be stated at once, it being bad practice to file successive demurrers to separate parts of a pleading. So where a party wishes to demur on different grounds to the same pleading, all the grounds should be specified in one demurrer, instead of filing different demurrers, it not being necessary that the grounds of demurrer be consistent with each other.

In some jurisdictions a demurrer must be accompanied by a certificate of counsel that he believes it good law and that it is not interposed for delay. Where plaintiff's demurrer to a defense was not sufficient, a further demurrer to the same defense, bad in form and insufficient for that reason, may be regarded as mere surplusage."

With respect to the necessity or propriety of specifying the grounds particularly upon which the demurrer is sustained, the rule is laid down in 31 Cyc. 346, as follows:

"It is unnecessary and improper for the court to make a finding of facts on its decision of a demurrer; nor is the court required to specify in the judgment the grounds of its ruling, where several causes are assigned."

One of the authorities cited to the above decision is that in *Dickinson v. Kinney*, 5 Minn. 409, the supreme court saying:

"In the trial of an issue of law raised upon demurrer to an answer, it is unnecessary for that court to find in its decision the facts that are admitted in the pleading, because such finding cannot influence the case one way or the other. What facts stand admitted must be governed by the pleading itself, and cannot be added to or taken from by any finding the court may make."

This, of course, does not interfere with the usual practice in Minnesota of taking admissions of facts as being facts upon which there need be no decision, for that is the

general rule in Minnesota. *Palmer v. Potter*, 26 Minn. 433. And when admissions are made upon the record which leave no issue of fact upon a particular thing, then the pleadings are controlled thereby.

In *Saltonstall v. Russell*, 152 U. S. 628, the supreme court said:

"The case having been submitted to the circuit court upon a statement of facts agreed by the parties, or case stated, upon which the court was to render such judgment as the law required, all questions of the sufficiency of the pleading were waived, and the want of an answer was immaterial; and no finding of facts by the court was necessary. *Willard v. Wood*, 135 U. S. 309, 311 (31:210, 213); *Bond v. Dustin*, 112 U. S. 604, 607 (23:835, 836)."

At any rate, this decision remains unreversed and the practice of the state court is not for this court.

In the case of *Michigan Trust Co. v. Ferry*, 228 U. S. 346, L. Ed. 867, suits were brought in Utah upon decrees of the probate court of Ottumwa, Mich. The defendants demurred to the complaint, and the circuit court sustained the demurrers and the circuit court of appeals affirmed that decision.

The question in that case was whether the decree was too broad for the jurisdiction of the probate court, and the supreme court said:

"Upon this question courts of other jurisdictions owe great deference to what the court concerned has done. It is a strong thing for another tribunal to say that the local court did not know its own business under its own laws. Even if no statute or decision of the supreme court of the state is produced, the probability is that the local procedure follows the traditions of the place. Therefore we should feel bound to assume that the Michigan decree was not too broad, in the absence of statute or decision showing that it was wrong.

But unless and until the supreme court of Michigan shall decide otherwise, we are of opinion that the probate court was right."

In *Sullivan v. Minneapolis & Rainy River Ry. Co.*, 121 Minn. 488, the court said:

“The grounds for the demurrer are: (1) That the court was without jurisdiction; and (2) that the complaint does not state a cause of action. It does not appear on what theory the court based its ruling.”

The court overruled the question of demurrer as to jurisdiction upon the theory that the defendant was not engaged, according to the showing, in interstate commerce and that the demurrer could not be sustained upon that ground. It then reversed the lower court which had sustained the demurrer upon both grounds upon the proposition that the complaint did state a cause of action on the merits.

Again, in the case of *Laird v. Vila*, 93 Minn. 45, in an action where it was claimed that a party had obligated himself to make his will conveying real and personal property, there was a demurrer introduced to the complaint, and the court said:

“Three objections are presented by the demurrer to each cause of action: (1) That the trial court is without jurisdiction of this action; (2) that another action is pending between the parties for the same cause; (3) that the complaint does not state a cause of action.

In holding that the first and second objections are not well taken, we need only refer to the repeated adjudications of this court in which the questions presented were decided and set at rest. In *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977, it was held that, while the probate court had jurisdiction to direct an executor to enter into a conveyance of real estate which his testator had bound himself in writing to make during his lifetime, still the court was without jurisdiction to decide against a party applying for such a conveyance. In other words, the court held it was without full jurisdiction in the premises. On the other hand, it was expressly held in *Evanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4, and reaffirmed in *Stallmacher v. Bruder*, 89 Minn. 507, 95 N. W.

324, that the probate court is without, and the district court has, jurisdiction over actions for the specific performance of parol contracts for the conveyance of real and personal property."

By this we see that it was not only the usual practice, but it was the necessary practice to bring in the question of the jurisdiction in this particular kind of a case, for it is perfectly apparent from the original case, as it seems to us, as it is from this case as we shall later argue, that specific performance could not have been granted upon the alleged situation as here presented. The appeal that was taken was abandoned. Not only that, but the Laird case pointed out that so far as apply to real estate where the wife had received the real estate under the will, pursuant to the agreement, she and her heirs were stopped to deny the matter.

Of course, under section 3483 of the Minnesota statutes, a contract for services could not be made orally which was not to be performed within one year. *O'Donnell v. Daily News Company of Minneapolis*, 119 Minn. 378.

In the inception and without partial performance, the alleged original contract would be within the statute of frauds of Minnesota.

In *O'Donnell v. Daily News Company*, 119 Minn. 378, at p. 385, the court said:

"For it is settled that a contract for services which by its terms shows that it is not to be performed or is incapable of performance within one year from the making thereof, is within the statute (*Spinney v. Hill*, 81 Minn. 316, 84 N. W. 116; *White v. Fitts*, 102 Mo. 240; *Chase v. Hinkley*, 126 Wis. 75; *Lee's Adm'r. v. Hill*, 87 Va. 497; *Gulport v. Renaue*, 94 Miss. 904.)"

In *Robertson v. Corcoran*, 125 Minn. 118, the court said:

But to authorize a court to decree the specific performance of an oral contract to give property

by will, the contract must appear reasonable, and be clearly and satisfactorily established; and it must also have been performed, on behalf of the beneficiary, to such extent and in such manner that he cannot be compensated properly in damages. If the part performance relied upon consisted in the rendition of services, the value of which can reasonably be measured in money, specific performance will not be enforced and the promisee must have recourse to other remedies. *Stellmacher v. Bruder*, 89 Minn. 507, 95 N. W. 324, 99 Am. St. 609; *Richardson v. Richardson*, 114 Minn. 12, 130 N. W. 4; *Haubrich v. Haubrich*, 118 Minn. 394, 136 N. W. 1025.

That case also said:

“The contention that these cases were not within the jurisdiction of the district court is without force. *Laird v. Vila*, 93 Minn. 45, 100 N. W. 656, 106, Am. St. 420.”

That case was decided in 1914, so that it is undoubtedly the rule in Minnesota now so far as its appellate decisions have passed upon the matter that a contract to make a will, even though oral, if one which can be specifically performed may be held to be valid in a court of equity, but that there must be such part performance as will prevent compensation for the services rendered, or, as pointed out of the statute of frauds.

But, we do not state that this is the law in Minnesota, for we do not think it is so far as it gives sanction to the rule that a contract of this sort may be made to make a will, and if the matter is material, our reason for opposing the rule would be that the Minnesota decisions may be examined from first to last, (unless there be something which we have overlooked), and yet we would claim that by reason of the fact that the public policy of Minnesota as declared in its statutes with respect to making wills and with respect to the statute of frauds, and with respect to the inheritance

which the wife shall receive and with respect to the revocation of a will by subsequent marriage, it is shown that it has been the legislative intent of the state from the beginning that such a contract would be invalid. We cannot find that this matter of public policy, except as to the statute of frauds, has been discussed in the Minnesota decisions, and the decisions have escaped the statute of frauds upon the theory of part performance.

But, in this case, these things become immaterial for two reasons:

1. There is not the slightest pretension in this case so far as the alleged contract with the defendant is concerned at the time of the alleged modification from the whole to two thirds, that there was any such delivery of property or any such change in any will or any such subsequent services as to make any pretended part performance or consideration.

2. It is not even claimed that the plaintiff did anything in the way of personal services or love or affection or household management or anything else for which she could be compensated.

Of course, a husband could not contract to make a will so as to will away his property from his wife, at least as to the two-thirds, because of sections of the Revised Statutes of 1905, given hereafter.

The same practice exists with respect to want of legal capacity to sue as is evidenced from the case of *State of Wisconsin v. Torinus*, 22 Minn. 272, wherein the Court said, at p. 273:

“The demurrer was on the ground that the complaint does not state facts sufficient to constitute a cause of action, and that it appears from it that plaintiff has no legal capacity to sue. * * * To make the pleading open to demurrer on that ground, the want of legal capacity must appear from it affirmatively. If it do not, such want of capacity can be taken advantage of only by answer.”

See *Lehigh Valley Coal Co. v. Gilmore*, 93 Minn. 432-434.

The same practice has prevailed in Minnesota as to definition of parties. In that case demurrer for defect of parties pointed out, as the court held it should do, the persons who were to be made parties, but that was the third ground of demurrer as the opinion shows in that case.

FEDERAL PRACTICE RECOGNIZES IT.

It would seem, however, to be unnecessary to spend much time upon this, for it has long been the established rule that a court may decide a case upon many grounds even though one of those grounds be that it lacks jurisdiction, and that if an error is claimed it may be claimed upon all the points of the decision, but if the court is willing to rest its decisions upon want of jurisdiction alone, it may decide upon that ground alone and that disposes of the matter.

Indeed, the practice is so common in the Federal courts that a distinction is made in the practice in appellate procedure, dependent upon whether the court bases its decision alone on jurisdiction or upon jurisdiction and other grounds. Under the federal procedure, since the court of appeals act went into effect, it is so that if the district court dismisses a case upon jurisdictional grounds and also upon other grounds, the appellate court is the court of appeals, while if it dismisses it upon want of jurisdiction alone, the only court to which resort can be made is the supreme court of the United States:

See *McLirsh v. Roff*, 141 U. S. 6661.

Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, L. Ed. 496.

As stated by the present Mr. Justice Van DeVanter in *Harris v. Rosenberger*, 145 Fed. 449, this matter is now foreclosed by the decision in the former case as pointed out by this, the Ninth Circuit Court of Appeals, in *Union Pacific Ry. Co. v. Oregon & Wash. L. Mfrs.*, 165 Fed. 1-18:

"In this court the appellees moved to dismiss

the appeal on the ground that only questions of jurisdiction are involved, and therefore that the appeal should have been taken to the supreme court. The answer to the motion is that the appeal to this court was taken not only on the ground of the lack of jurisdiction of the court below over the cause of action alleged, but also upon the ground that the order appealed from commands the defendants to violate the act of congress to regulate commerce, and on the further ground that it was made in the absence of indispensable parties. Only the question of jurisdiction can be taken from the trial court directly to the supreme court, and then only questions 'involving the jurisdiction of the circuit court as a federal court.' *Louisville Trust Co. v. Knott*, 191 U. S. 225, 233, 24 Sup. Ct. 119, 122, 48 L. Ed. 159; *U. S. v. Jahn*, 155 U. S. 105, 115."

Indeed, this is the rule as incorporated into Section 238, the Judicial Code.

So that the fact that the decision of Judge Brown in this case may have covered matters outside of the merits does not prevent the effect of the decision upon the merits. The court had a perfect right to say that this case is defective both in substance and form and the present case stands in precisely that situation.

Nor do we know whether the decision ought to have covered or was actually intended to cover, jurisdiction on any matters except the merits; they were put in and the merits alone argued, (Rec., p. 575.)

Indeed the case of *II v. Brown*, 201 Fed. 246, decided by *this Court* was reversed by the Supreme Court of the United States in 235 U. S. 312, with an expression of surprise that the court of appeals should have regarded the matter in any other light than that the highest court of the Hawaiian Islands did not correctly exercise its own powers and duties. The Supreme Court saying:

"It is unnecessary to consider whether this second case again made the matter *res judicata*. It is enough to refer to it here as authority with regard to matters of local procedure, as to which innu-

merable cases have established the weight to be given to the local courts. *Tevis v. Ryan*, 233 U. S. 273, 291, 58 L.Ed. 927, 967, 34 Sup. Ct. Rep. 481; *Nadal v. May*, 233 U. S. 447, 454, 58 L.Ed. 1040, 1041, 34 Sup. Ct. Rep. 611.

It appears to us surprising to suggest that the highest court of the Hawaiian Islands did not decide in accordance with the requirements of the law of which that court was the final mouthpiece; and that courts of another jurisdiction, sitting long afterwards, know its duties and powers so much better as to be entitled to pronounce its proceedings void. The caution required in such a venture, even as against less authoritative decisions, has been stated and restated, from *United States v. Percheman*, 7 Pet. 51, 95, 8 L.Ed. 604, 620. to *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 354, 57 L.Ed. 867, 874, 33 Sup. Ct. Rep. 550. And when it is added that the grounds for the supposed invalidity are matters mainly of form and local procedure, and wholly of local control, it seems to us plain that the judgment must be reversed."

But, it has long been the practice in Minnesota, as evidenced by other decisions, some of them of this sort of cases, that demurrers are interposed upon the various grounds of the statute in the same demurrer and decided together by the lower court and decided together by the Supreme Court.

On pages 81-83 counsel presents an argument against the binding effect of the decision on demurrer. He gives us *Russell v. Place*, 94 U. S. 608, which holds that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But it must appear upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. If counsel would examine the Record, pages 575-6, he would find that we showed by *W. A. Lancaster* that the merits of the case was the one thing that was argued for one and one-half days and the decision it-

self says that the demurrer was sustained upon all of the grounds. This is not disputed.

Counsel cites *Hoover v. King*, 43 Oregon 281, to the effect that when a case presents more than one issue upon which the judgment may rest while one goes to the merits, and others do not, it will be inferred that the judgment was not based on the merits unless it so appears.

Again we call attention to the fact that it does so appear in the case and that the judgment itself, (Rec., p. 90), recites that the demurrer is in all things sustained.

Counsel cites *Kleinschmidt v. Binzel*, 14 Mont. 31, to the effect that where a demurrer has been interposed to the complaint on several grounds both as to form and merits and it is sustained generally, it does not bind the parties on the merits where it does not appear in the record or by extrinsic evidence that that was a ground of decision, but we call attention to the fact that it does again appear in this case, the only question argued was the merits.

He cites *Bissell v. Spring Valley Township*, 124 U. S. 225, which holds that the entry of final judgment on demurrer concludes the merits in a subsequent action on a different claim so far as the relation relates to matters litigated on the demurrer in a prior action.

The case cited from 29 Gratt. 494, is to the same effect and this is the class of cases cited by counsel on this proposition. His reason for so thinking is that the grounds of demurrer covered both the merits and other subjects in this case and he points to *Gerrish v. Pratt*, 6 Minn. 53, to the effect that a judgment on the pleadings for costs on the ground that the complaint does not contain facts sufficient for a cause of action, is not a bar to a second action for the cause of action attempted to be alleged in the first complaint. But that case was one where the action was brought under a replevin bond. The defendants pleaded a former judgment in favor of the defendants in the district court in

Minnesota. The Minnesota court recognized the rule in that decision, that a judgment was a bar as to the matters in issue, but that the lower court had found that that judgment was rendered only for costs and not on the merits involved in the action, but because the complaint did not state a cause of action. The court in that case held that if it had been an adjudication on the bond itself, it would have been a bar but that the lower court had found that the original decision was not made upon the merits.

There has been a practice grown up in Minnesota which permits the court to dismiss a case for failure of proof, or upon an objection to the introduction of evidence, or a motion to dismiss by the opposite party, and then a judgment for costs alone may be entered by virtue of the statute. Revised Laws, 1913, Sections 7982, 7974. But there is also a practice which enables the court to sustain a demurrer on the merits or to render judgment upon a motion for judgment upon the pleadings and to render that judgment upon the merits as well as for costs. See Revised Statutes of Minnesota, 1913, Section 7782. The later practice is what the court followed in this case. It sustained the demurrer on the merits, and ordered judgment on the merits, (Rec. p. 90).

II.

THE DECISION OF THE MINNESOTA COURT WAS RIGHT; BUT RIGHT OR WRONG, IT WAS BINDING IN MINNESOTA, AND THEREFORE BINDING IN OREGON.

The decision that was made in Minnesota covered all the grounds of the demurrer and, as previously pointed out, the practice in Minnesota is the practice which controls this court.

COUNSEL'S PRECEDENTS.

We must keep in mind in the application of precedents, two things:

1. What they really hold which can only be told when

we keep in mind the question that was up for decision.

2. Whether they are binding precedents or only suggesting precedents.

Keeping these things in mind, we examine counsel's precedents to our heart's content and find no precedent where any court, by any decision, which is either binding or suggestive has ever rendered a decision in favor of a complainant on as weak a case as plaintiff has here. Let us examine them and see.

Starting in at page 21 of Appellant's Brief, with the case of *Brown vs. Sutton*, 129 . S. 238, we have a Wisconsin case, wherein an intestate bought land for a woman and promised her that he would make the title of it to her upon the consideration that she would care for him during the remainder of his life as she had done during the past. He was a man in declining years and actually entered into an agreement to receive her services the remainder of his life. He was an old and sickly man; he needed a great deal of nursing and wanted more care and attention than people usually wanted. He dreaded to be alone. She went nearly everywhere with him and devoted most of her life to him as a daughter would do to her father. It is so unlike this case as to need no discussion.

Turning to the authorities cited in Appellant's Brief, page 43, we find the case of *Kelly v. Devine*, 65 Ore. 217-218. That case is wholly unlike the one at bar. There a contract was shown to have been made about ten years prior to the death of the father, but the attack was on the theory that the plaintiff only spent part of his time at the farm and in the management in the business of the father and was paid for his labor in full. The court held that the preponderance of the testimony was sufficient to sustain the finding. There the father made the contract with the son at a time when he was anxious to keep the son with him and the court points out that those were services such as could not be measured by a pecuniary standard.

Coe v. Coe was a divorce case for the dissolution of the marriage contract and a suit for an accounting.

Counsel cites from Robertson v. Corcoran, 125 Minn. 118, wherein the Minnesota court held that such a contract would have to be reasonable and satisfactorily established and performed to such an extent that the beneficiary could not be properly compensated in damages. This case does not take up the point which seems to have been entirely overlooked, by the Supreme Court in Minnesota, that the legislative acts of that state fix a public policy different from this view. But the facts in that case were that the plaintiffs were brother and sister and the children of Jane Carr. Their mother had died when they were six and ten years respectively, and a childless farmer made an arrangement with their father to allow them to be adopted and to provide them a home and treat them in all respects as his own children and agreed that if they should remain with him as members of his family until they grew up, he would bequeath them one-half of his property. He frequently stated the agreement to them and promised to perform upon his part. The court held in that case that the complaint stated a cause of action but that the court could not tell what the result would be upon the merits in advance.

O'Hara v. Dudley, 95 N. Y. 403, is a case where the testatrix willed the bulk of her estate to her lawyer, her doctor and her priest in ~~trust~~ and has no application here.

Curdy v. Burton, 79 Cal. 420, was a California case of this same nature and relied upon the New York case. It has no application here.

Woodville v. Morrill, 130 Minn. 92, was a case involving the validity of the will of a deceased brother who had been in an insane asylum, and we see no special reference that it has, to this case. And the court pointed out that the testator had remembered his relatives in an unsubstantial way by reason of certain prejudices that he had against

them, but his failure to provide for them did not invalidate his will. The court points out:

“The fact that he practically ignored them in the prior wills and at a time when there was no claim of insanity, fully warrants the inference that it was deliberate and intentional.”

That was a case where the legacies to friends were held justifiable. In that case there was a gift to the wife of the attorney who drew the will, which attorney made great efforts to take the testator out of the asylum.

Thomas v. Maloney, 142 Mo. Appeals 193-198, was a case where parties had reared a child until she was twelve years old as their child. She did not know the difference until that time. They then agreed to adopt her and keep her as their own daughter. They told her and she had really believed that they had adopted her; they had gotten a promise from her father not to treat her as his child and she stayed with them rendering to them filial love and duty such as she would owe to parents, until she was twenty-one years of age. None of these elements appear in this case on this record. We have already pointed out that this case was limited to a contract and not to adoption and was not tried upon the theory of adoption and therefore the rules with respect to adoption would not prevail.

Fiske v. Lawton, 124 Minn. 85, was a case where a child was taken in Ohio by a contract to adopt which was in writing and afterwards lost. Such a contract being valid in Ohio the Minnesota court supported it. But as we have previously pointed out, counsel decided not to rest upon that ground and to rest upon the alleged contract.

Daniels v. Wagner, 237 U. S. 547, is a case which went up from this circuit. Counsel says the facts are different but the equities the same. That was a case where the State of Oregon prepared lists, selected lands, and placed designated school lands, and filed those lists in the local office and transmitted them to the State Local Land Office for ap-

proval. Before the approval, the state sold lands to Daniels. The department then refused to approve the state lists because of certain errors and this left Daniels without the right to the land, etc., etc.

We need not go further to show that the case has no application here.

On page 52 of Counsel's Brief, he suggests that they offer a letter of Mr. Barnes, but gives no place where that letter can be found in the record and we have not been able to find it in the record and do not remember it, unless it could be pointed out, of course, it could not be used.

Counsel suggests that the case of *Laird v. Vila*, 93 Minn. 45, had been decided in 1904 to the effect that a party might obligate himself to devise and bequeath real estate and personal property to minors in consideration for their assumption of the peculiar domestic relation and the performance of services impossible to estimate by pecuniary standards and holding that the district court was a court that had jurisdiction of such a case. We shall point out briefly under our discussion, why this made no difference, but the fact remains that the district court made the decision upon rightful grounds as we claim, and the plaintiff must have been so advised else she would have prosecuted her appeal; whether right or wrong, makes no difference in the validity of that judgment as the authorities given will show.

We might continue to go through these cases one by one and point out their inapplicability to the facts in this record and when we are through, we would find not a single case sustaining those of appellant. We find that counsel has picked up cases of old and decrepit men and women taking active and loyal children or nurses and getting from them that sort of care which cannot be computed in such way as to give them fair compensation and such care and relations as the party would not have assumed under an ordinary contract of hire. But none of these cases are applicable to the case at bar. They are congregated here in the brief

under various headings with no applicability to the Assignment of Errors and no such segregation of principals as enable us to discuss them as applicable to any particular thing and we do not believe that it is our duty to wade through them and weary the court by discussing case by case under these circumstances.

At the time this demurrer was interposed and this case argued upon the merits there were a number of things which had not been passed upon by the Supreme Court of Minnesota and which have never been argued to the Supreme Court of Minnesota to this day in the way we think they should have been, and which would have justified that court in upsetting its authorities if necessary, upon this case and there were other lines of authorities that would have compelled that court, if it followed its own decisions to the letter, to hold that there was no such inequitable treatment of this plaintiff by Mr. Smith in their financial matters as to prevent her from obtaining compensation if she was entitled to anything for her services, or that she had not been more than paid for all of the relation which she ever occupied to him.

In the first place, it was stipulated and adjudicated that this was an oral transaction. As such, it could only be held for her on the theory of specific performance or a remedy kindred to that. Specific performance is always addressed to the conscience of a court of equity and there was nothing about this case to show any hardship administered to the plaintiff—only that she wanted Mr. Smith's property and did not get it—she was not entitled to it.

Counsel suggests that a trust should be carried out but he fails to show that there was any trust. He says that the record admits of no doubt that the defendant is concealing something, but he points to no place in the record which shows this and there was no such place. He assumes that a fiduciary relation existed in favor of his client, but does not show it. He says that what he claims was Mr. Smith's ex-

pressed agreement in 1900 and 1901 to leave the complainant all of his property, and at the time of the alleged modification engagement, is confirmed by his admission of his practical achievement by the divorce obtained through his dictation and by the admission of himself and his wife to third parties. The trouble is that counsel points to no place in the record where any such things are shown and they were not in the record.

In other words, we showed by Jessie Carey Smith, that the plaintiff made up her mind to get her divorce because her husband was in trouble again and in jail and she asked the plaintiff herself to tell Mr. Smith that she decided to get a divorce. While the plaintiff does not deny this in her rebuttal, she simply avoids it. The defendant says that she never had such an understanding and never heard of it. Mr. Smith's whole conduct shows that he never so understood it. He told the witnesses when he signed his last will that that was his will. He told Mr. Lauderdale that he had simply had an agreement with her to live there and he would pay a certain amount per month and she should pay the household bills and act as his housekeeper. She did not deny that in rebuttal. She side-stepped direct admission of it or a direct denial of it in her cross-examination of her case. We may assume that it was true from her own actions in the matter. We showed by the defendant and by Miss Clarke as previously pointed out that the dramatic story which she concocted to impress the court with a view that the defendant had lovingly promised her on the night of her engagement, that she would not come between her and Mr. Smith, and that Mr. Smith modified the agreement on the following morning so that his intended wife could have one-third of the estate. We showed by these witnesses that were present on the night that the engagement was brought up, that plaintiff's story was not true. Plaintiff's rebuttal shows that she does not want to deny that fact (Rec., p. 493). We showed by the same wit-

ness, that she saw nothing of such interview as the plaintiff claimed that she had with Mr. Smith just before breakfast. We showed by the plaintiff that Mr. Smith never talked to her about property until the night of this alleged modified agreement as claimed and also the night following the alleged tale of the engagement. In fact the whole case bristles with things inconsistent with plaintiff's story. Her whole life afterwards is out of accord with the claim which she makes. Mr. Smith's whole life was out of accord with it and none of her relatives were able to bolster it up.

The segregated suggestions such as counsel makes in his brief, pages 76-83, show upon the face both that they were inapplicable and that counsel has simply selected groups of cases from some Digest or some place of that sort and thrown them in in bunches in an attempt to magnify segregated suggestions into controlling rules.

Now the fact is, that as pointed out in *Robertson v. Corcoran*, 125 Minn. 118, *supra*, which was decided after the demurrer was sustained in Minnesota, that our court had uniformly held that where part performance relied upon consisted in the rendition of services, the value of which could be reasonably measured in money, specific performance could not be granted and the promise must have recourse to other remedies that have been decided in the case.

Stellmacher v. Bruder, 89 Minn. 507.

A study of that complaint and a study of the evidence which is now in this case, reveals the fact that absolutely no pretense is made of the performance of any services by the plaintiff, after the alleged modification to make the agreement two-thirds, and the society of the children, (which seems to have been forgotten), was only kept about one year, before Mr. Smith decided that he should not impose that care upon his wife. The plaintiff had not faithfully discharged her duties as a housekeeper in her payments of bills; but had squandered his money and had discredited Mr. Smith with the tradesmen, was pawning arti-

cles of the house to send money to her husband so that he could gamble it away and Mr. Smith was supporting her and continued to support her for a long time thereafter.

The situation of the parties was such that he did not take the sort of care from her which an old and decrepit person would need from a nurse or a daughter and if she had needed it, he was not getting it. The complaint did not set forth that degree of hardship toward the plaintiff in the matter of part performance that would enable a court of equity to decree that part performance should be granted. The Minnesota court heard it on the demurrer and so decided. The Oregon court heard it upon the facts and so decided. The plaintiff's counsel must have advised her that that rule was applicable when that demurrer was sustained, else they would have prosecuted her appeal.

In addition to this, the following applicable principles show that the decision in Minnesota was right:

1. This was a contract for personal service which it was claimed was to extend over a period of more than one year, and the rule of the Statute of Frauds applied, unless there was sufficient part performance to take it out of the statute, which there was not.

2. Being a contract for service, the statute of Minnesota and the decisions of this court require that it be presented to Probate Court unless it was a case where specific performance would be required.

3. There was no element of this case as alleged or proven to take it out of the rule that if there was any contract which was a contract to act as the housekeeper of Mr. Smith and so far as it had other allegations, it was too indefinite to amount to anything.

4. Whether it was entirely a contract for personal services or whether it was a contract to include personal love and affection, neither could be enforced as against the plaintiff or as against the son for whom she had no right to contract, and therefore, there was no mutuality of remedy,

and at any stage of the alleged contract, a specific performance could be decreed under such circumstances.

5. The changed conditions of both of the parties and the inconsiderate services which the plaintiff rendered and the great amount of expense which the deceased stood in her behalf, made it inequitable to render any specific performance if there had been a contract such as claimed.

6. Her alleged contract to get a divorce was void as against public policy as we claimed at the trial.

1, 2. *Case one for Probate Court in Illinois.* It must be remembered that the District Court is the court of general jurisdiction in Minnesota. That has been uniformly held.

In *Agin v. Heyward*, 6 Minn. 110 (53), it was said:

"It is, in our opinion, the one great court of general jurisdiction to which all may apply to have justice judicially administered, in every case where the constitution itself does not direct application to be made elsewhere."

The only reason, therefore, as to why the District Court would have no jurisdiction of the subject-matter would be that it was a contract for services covered by the Probate Court.

The Constitution, Sec. 1, Act 6, provides:

"Courts—The judicial power of the state shall be vested in a supreme court, district court, courts of probate, justices of the peace, and such other courts, inferior to the supreme court, as the legislature may from time to time establish by a two-thirds vote."

And in Sec. 7 of Art. 6:

"A probate court shall have jurisdiction over the estates of deceased persons and persons under guardianship, but no other jurisdiction, except as prescribed by this constitution."

Section 3730 of the Rev. Laws of 1905 provided:

"All claims against the estate of a decedent, arising upon contract, whether due, not due, or contingent, must be presented to the court for al-

lowance, within the time fixed by the order, or be forever barred: Provided, that contingent claims arising on contract, which do not become absolute and capable of liquidation before final settlement need not be so presented or allowed. * * * If the claim presented be contingent, or not due, the particulars thereof shall be stated."

The Supreme Court of the United States reversed a decision of the District Court for Minnesota in *Sec. Tr. Co. v. Black River Nat. Bank*, 187 U. S. 211 (L. Ed. 147), by holding that a non-resident owner of a claim against a decedent's estate could not sue the administrator in the Federal Court because he could not sue in the State Court after the expiration for filing claims expired. That was statutory as set out by the court. The court reviews the Minnesota cases and says:

"The conclusion to which we are brought by an examination of the statutes of the state of Minnesota and of the decisions of the courts of that state in construing and applying them, is, that had a suit against an administrator of an estate been brought in the courts of that state, after the expiration of the period limited by the order of the probate courts, in which creditors may present claims against the deceased for examination and allowance, and after an allowance of the administrator's final account, and a final decree of distribution, such suit could not have been maintained."

And again:

"It is the policy of the state of Minnesota like that of many other states to prescribe a shorter term of limitations to claims against the estates of decedents than claims against living persons. Can that policy be defeated by a ruling of the Federal courts that the provisions of the state in that regard do not apply to parties bringing suit in those courts? In that event, the very mischief pointed out and deprecated in *Yonley v. Lavender* would ensue, that 'the rights of those interested in the estate who are citizens of the state where the administration is conducted are materially changed, and the limitation which governs them does not apply to the fortunate creditor who happens to be a citizen of another state.' The answer given to

such a proposition by this court in the case just cited was: 'This cannot be so. The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal courts in the enforcement of individual rights.' "

Without going further, it is apparent, *as a claim* on a contract, the time to present it in the Probate Court and the jurisdiction to determine it had gone.

Appelby v. Watkins, 95 Minn. 455, limits some earlier cases and holds to the rule of exclusive jurisdiction.

As to contract for services, the Minnesota Court has held that they should have been presented to the Probate Court, under the statute supra.

In *Stallmacher v. Bruder*, 89 Minn. 507, the Minnesota Court said:

"A party may obligate himself to make his will in a particular way, or to give specific property to a particular person, so as to bind his estate. But the courts will be strict in looking into the circumstances of such agreements, and require full and satisfactory proof of the fairness and justness of the transaction. *Newton v. Newton*, 46 Minn. 33, 48, N. W. 450; *Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4. The remedy for the breach of such a contract depends upon the facts of each particular case. If the contract be an oral one to devise land, and is reasonably certain as to its subject matter and its stipulations, equity will decree specific performance, if there has been a part performance of such a character as will take a paprol agreement to convey land out of the statute of frauds, upon principles which courts of equity recognize and act upon. If the consideration for the contract be labor and services which may be estimated, and their value liquidated in money, so as reasonably to make the promises whole, specific performance will not be decreed.

So that if this contract was of the sort, which, upon the face of the complaint, could be compensated in damages, then the agreement should have been presented if there was one, to the Probate Court, and the Probate Court should have tried out the matter.

Following the Stallmacher case by that of Richardson v. Richardson, 114 Minn. 12, the Supreme Court of Minnesota denied the specific performance of an alleged contract upon the ground that the complaint did not state facts sufficient to constitute a cause of action in a case quite similar to this, except that it was alleged that the old couple made an agreement with their nephew that if he would get married and he and his wife come and live with them and render them services, love, affection, etc., that their property would be conveyed to them. The nephew got married and certain real estate was conveyed to him by the uncle and aunt, the deed was recorded and then an action was brought to set it aside. The action was dismissed and the land reconveyed and the claim made in the action now under consideration was under the alleged contract. The Supreme Court said:

"Plaintiff refers us to Svanburg v. Fosseen, 75 Minn. 350, 78 N. W. 4, 43 L. R. A. 427, 74 Am. St. 490. In that case five opinions were written. The result and the law which determines this case was stated in Stellmacher v. Bruder, 89 Minn. 507, 95 N. W. 324, 99 Am. St. 609. The rule in that case, which we think is correct, is:

"This case, we think, is governed by that rule. The labor and services rendered in this case are susceptible of fair estimate, which will fully compensate the plaintiff and 'reasonably make him whole'. The contract itself was quite indefinite. The services that were to be rendered under it, to say the least, require interpretation and explanation, especially the provision as to cohabitation."

When we think of the services that are alleged in this case and the allegation of the Richardson case, we see that that was a much stronger case than this for the services there described were as follows:

"Those services are more specifically stated thus: That the services so rendered by plaintiff and wife as aforesaid cannot be enumerated specifically, but consist of housework of every kind and character, in obedience to the requests and directions of the deceased and defendant, all work in and about and around the house and otherwise,

of every name and nature, required in housekeeping and in running and maintaining a home, of sewing, washing, ironing, care, comforts, assistance, company, love, affection, intimate relationship, of nursing in sickness of defendant and deceased, and much other and different kind of work, service and attention of a peculiarly personal domestic nature, describable only by the common relationship of parents and children, and of such character both inside and outside.

The services are further described in this manner: 'Further complaining, plaintiff alleges that prior to the fall of 1904, for some considerable time, the defendant and her late husband had lived alone in their said home, and were lonesome, and longed for the presence and membership of (in) their life and environment of some one or relative in whom they might have confidence, and in whose presence, cohabitation, and pe- domestic relation with them they might take comfort and better enjoy life in their old age, and so continued until deceased's death; that such lonesomeness and longing was more intense and pronounced in the winter months of the year than at other seasons thereof; that they and each of them were also during all of said time more or less sick, disabled, and infirm, and confined to bed on that account, principally during the winter seasons, and on that account, also, desired some one's residence in their home with them for personal and domestic comfort, care, nursing, company, protection, and aid, who, on account of close relationship, would be more agreeable, and closer to them, and concerned about their welfare, and attentive to their peculiarly personal and domestic wants, than the ordinary person under service or attention.'

It is alleged that plaintiff did marry, and did live with the defendants, and rendered the services described. The agreement was that if plaintiff would marry, and would live with them, with his wife, and render the services of the character mentioned, then the defendants would leave and give him all their property. Relying on this promise, plaintiff did marry and render the services mentioned—'served them as a son would his father and mother, and in the same personal domestic relation.'

The Minnesota Rule as to this Case.

The same rule was taken up in *Haubrich v. Haubrich*, 118 Minn. 394, in a case that looks as if the theory of it might have been quoted from that of the plaintiff's case in *Minnesota*. The case was tried by the court and a finding made that there was no contract. The opinion says:

"The court also made findings of evidentiary facts to the effect following:

The deceased, in 1885, married the plaintiff's mother, Alvena Krause. The plaintiff was then some five years old. He went with his mother to the home and farm of the deceased, who had no children, and was given the name of Max Haubrich. Thereafter, and until his mother's death all three of them lived on the farm as one family. The plaintiff during such time conducted himself and was treated in all respects as the son of the deceased. He went to school in winters, and the rest of the time he did chores and worked on the farm as other boys in the neighborhood did for their parents. After the death of the mother, the deceased and the plaintiff continued so to work and live together on the farm until June 1, 1906, when the plaintiff went to North Dakota. He there took land under the United States homestead laws by filing thereon, returning in about ten days. In November thereafter he went back to his homestead, and resided thereon for one year, when he commuted and proved up on his homestead, paid for the land, and again returned to the deceased on this farm. In the fall of 1908 he was absent, working for his own benefit in St. Paul and Minneapolis, for two or three months. Immediately prior to April 1, 1909, he was in Minneapolis for some two months; but on that date, and seventeen days before the deceased died he returned to him and remained with him until his death on April 18, 1909. The deceased, after the death of his wife, on many occasions and at many different times, using various forms of expression, said in substance that he would give or leave all his property to Max when he died, and that the boy, Max, would get or have it all when he died, and he intended that Max should have all his property at his death, but whether this should be by deed or will, or he thought Max as his stepson, would inherit it, is not

clear, and is not found. Plaintiff received from the deceased, after June 1, 1906, the sum and value of \$1,300 in money and personal property, either as a gift, or in payment of the labor and services done or rendered by him to the deceased, who died intestate, and did not leave or give to the plaintiff any of his property, except the \$1,300.

The trial court as a conclusion of law directed judgment for the defendants, to the effect that the plaintiff take nothing by his suit, and that he had no title to or interest in any of the property left by the deceased.

The plaintiff's assignments of error raise the question whether the facts found sustain the conclusion of law, and whether the findings of fact are sustained by the evidence.

The law applicable to these questions is too well settled to justify any extended discussion. A party to a contract may obligate himself to make his will in a particular way, or to give specific property at his death to a particular person, so as to bind his estate; but courts will require full and satisfactory proof of such contracts and of the fairness of the transaction. The remedy for breach of the contract depends upon the circumstances of each particular case. If it be an oral contract, and its subject-matter land, equity will decree specific performance, if there has been such part performance as will take an oral agreement to convey land out of the statute of frauds. Specific performance of the contract will not be enforced, where the consideration is labor and services which may be estimated and their value liquidated in money.

If the facts found by the trial court are sustained by the evidence, we are clearly of the opinion that they support the conclusion of law and justify the judgment for the defendant.

The only debatable question presented by the record is whether the evidence sustains the controlling findings of fact; the primary one being that the alleged contract was not made. The plaintiff called several witnesses, who severally testified to the effect that the deceased repeatedly state that the plaintiff should have all his property when he died. The fair inference from this evidence is that stated by the learned trial judge in his findings of fact. There was, on behalf of the defendants, evidence tending to show statements

by the plaintiff to the effect that there was no agreement between him and the deceased as to payment for plaintiff's services. We have carefully considered all of the evidence, and find that it fairly sustains the findings of fact."

Certainly the services that were rendered in that case were much more in accord with the alleged contract, a much greater fulfillment of it and altogether more in accord with the conduct of the parties; yet they were insufficient.

But to authorize a court to bequeath a specific performance of an oral contract to give property by will the contract must appear reasonable, and be clearly and satisfactorily established; and it must also have been performed, on behalf of the beneficiary, to such extent and in such manner that he cannot be compensated properly in damages. If the part performance relied upon consisted in the rendition of services, the value of which can reasonably be measured in money, specific performance will not be enforced and the promisee must have recourse to other remedies. *Stellmacher v. Bruder*, 89 Minn. 507, 95 N. W. 324, 99 Am. St. 609; *Richardson v. Richardson*, 114 Minn. 12, 130 N. W. 4; *Haubrich v. Haubrich*, 118 Minn. 394, 136 N. W. 1025."

The court in that case then announced that under certain circumstances specific performance may be decreed and then points out that they could not tell under which rule the case would come until the evidence was taken, but that the District Court had jurisdiction of the matter.

The case of *Robertson v. Corcoran*, 125 Minn. 118, decided in 1914, follows the same rule. This alleged contract then was never made, as we view it; but if it had been made it was for services only. The Minnesota Court so concluded and there have been no reversals. Right or wrong, that is the law of the case.

3, 4. 5. *SPECIFIC PERFORMANCE IN FEDERAL COURT WILL ONLY BE GRANTED TO A PARTY WHO HAS NOT BEEN IN DEFAULT, OR WHO HAS NO ADEQUATE REMEDY AT LAW, OR WHERE THERE IS MUTU-*

ALIY OF REMEDY AND AN ADEQUATE CONSIDERATION.

In *Rutland Marble Co. v. Ripley*, 10 Wall, 339 (L. Ed. 955), Mr. Justice Strong said:

"Such a decree is not a matter of right, it rests in the sound discretion of the court and, generally, it will not be made in favor of a party who has himself been in default. In Story's Equitable Jurisprudence, Sec. 736, it is said that 'In cases of covenants and other contracts where a specific performance is sought, it is often material to consider how far the reciprocal obligations of the party seeking the relief have been fairly and fully performed. For, if the latter have been disregarded, or they are incapable of being substantially performed on the part of the party so seeking relief, or from their nature they have ceased to have any just application by subsequent events, or it is against public policy to enforce them, courts of equity will not interfere.' To the same effect are Smith's Principles of Equity, 220; Thompson v. Tod, Pet. (C.C.), 380; Lewis v. Wood, 4 How. (Miss.), 86, and many other cases."

And again:

"Another reason why specific performance should not be decreed in this case, is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the Marble Company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice. And it is a general principle that when—from personal incapacity, the nature of the contract, or any other cause—a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former. Fry Spec. Perf., Sec. 286."

The Circuit Court of Appeals for the third circuit in *Tanss v. Corbin*, 142 Fed. 660-666, said:

"It has long been a settled rule of equitable procedure, that specific performance of a contract will not be granted by the court (to whose judicial dis-

cretion the latter is always submitted), unless the remedy be mutual, or if the contract be otherwise unequal. On this ground, in a large class of cases, this remedy is denied, because, however possible specific performance may be of that side of the contract which is presented for enforcement, such remedy was not open to the defendant against the plaintiff. This remedy is denied by courts, where there is a contract of continuing personal service. As courts cannot practically and justly compel the performance of personal service, at the suit of the one to whom such service is due, so they will not, at the suit of the one from whom such service is due, enforce the other side of the contract, even though no practical difficulty presents itself to such enforcement."

The Circuit Court of Appeals of the eighth circuit is likewise on record with amplifications of the rule. In *Shubert v. Woodward*, where the contract was for services, 167 Fed. 47, said:

"The specific performance of a contract by a court of equity is not a matter of right. It rests in the discretion of the court, not in its arbitrary whimsical will, but in its sound judicial discretion informed and directed by the established principles, rules, and practise of equity jurisprudence. Hennessey v. Woolworth, 128 U. S. 438, 442, 9 Sup. Ct. 109, 32 L. Ed. 500. Nor are these principles and rules and this practice hard, fast or without exception. They are rather advisory than mandatory, and the application of the rules and of their exceptions to each particular case as it arises is still intrusted to the conscience of the chancellor. Yet these principles and rules and this practice serve to inform the intellect and to enlighten the conscience and by them the judicial discretion of the court must be guided. Federal Oil Co. v. Western Oil Co., 121 Fed. 674, 676, 57 C. C. A. 428.

Specific performance will not ordinarily be decreed in favor of a party to a contract against whom the court cannot efficiently compel its performance. The obligation and the remedy under the contract must be mutual. 2 Beach on Contracts, 885, and not 1; *Marble Co. v. Ripley*, 10 Wall, 339 358, 19 L. Ed. 955; *Fry on Specific Performance of Contracts* (3d Ed.), Secs. 440, 441; *Welty v. Jacobs*, 171 Ill. 624, 49 N. E. 723, 40 L. R.

A. 98; Lancaster v. Roberts, 144 Ill. 213, 33 N. E. 27; Chicago Municipal Gas Light & Fuel Co. v. Town of Lake, 130 Ill. 42, 60, 22 N. E. 616; Ogden v. Fossick, 32 L. J. Eq. (N. S.), 73; Buck v. Smith, 29 Mich. 166, 18 Am. Rep. 84 Richmond v. R. R. Co., 33 Iowa, 422. * * * But it is both unreasonable and unjust for a court of equity to constrain one party to an agreement to specifically perform it when it is without power to compel the other party to do so and he may escape its performance at will, and the general practice as well as the weight of authority sustains the rule.

In Lindeke v. Converse, 198 Fed. 618-623, the eighth C. C. A., in speaking of *dicmfwyepth*, said:

"It is an immemorial principle of equity jurisprudence that nothing but conscience, good faith, and reasonable diligence can call a court of equity into action."

"It is obvious that a wise and just administration of this law requires that such issues shall be framed and tried before the memory of the witnesses familiar with the transactions of the bankrupt at and shortly before the time of his adjudication has been dimmed by long delay and before they and the documentary evidence surrounding these transactions have been scattered and lost.

If a court of equity has no jurisdiction, then the Federal Court will not keep the case to assess damages.

In this second case we find that one witness to the will of 1902 and another to the last will, and Mr. Bell who kept the last will had died and Arthur Smith had run away before this trial and that the second case was never seasonably brought.

Blue Point Oyster Co. v. Hoagman, 209 Fed. 278 (Wash.).

The *matter is set at rest for this court* by the decision in Pantages v. Graum, 191 Fed. 317 (9 C. C. A.), by an opinion by His Honor, Judge Wolverton, 191 Fed. 317-323-, when the court said:

"It is a fundamental principle that specific performance of a contract will not be decreed unless it can be rendered obligatory upon both parties. In other words, the remedy must be mutual; other-

wise, it cannot be invoked. *Marble Co. v. Ripley*, 10 Wall, 339, 19 L. Ed. 955; *Firth v. Ridley*, 33 Beavan's R. 516; *Shubert v. Woodward*, 167 Fed. 47, 92 C. C. A. 509; *Duff v. Hopkins* (D.C.), 33 Fed. 599, 608; *Pullman Palace Car Co. v. Texas & Pac. R. R. Co.* (C.C.), 11 Fed. 625. Nor, it is held, will the remedy avail unless both parties at the time the contract is executed have the right to resort to equity for its specific enforcement; *Norris v. Fox et al* (C.C.), 45 Fed. 406. The principle has been carried into the statutes of California, and is enforced by its courts. *Pacific Electric Ry Co. v.*

And again:

"So equity will not award specific performance where the duty to be enforced is continuous and reaches over a long period of time, requiring constant supervision by the court. *Pacific Electric Ry. Co. v. Campbell-Johnston*, supra."

In *Town of Glenwood Springs v. Glenwood Light & W. Co.*, 202 Fed. 678-684, the court said at page 684:

"And courts of equity will not ordinarily compel the specific performance of a contract, either by decree or by an injunction against its violation, at the suit of a party who is guilty of a substantial breach of it. *Shubert v. Woodward*, 167 Fed. 47, 57, 92 C. C. A. 509, 519; *Marble Co. v. Ripley*, 10 Wall, 339, 358, 19 L. Ed. 955; *Taussig v. Corbin*, 142 Fed. 660, 667, 73 C. C. A. 656, 663."

All of these points are applicable here, to the alleged contract on trial.

A long delay.

Insufficient consideration.

Indefiniteness.

Change of conditions.

Remedy at law.

Want of mutuality of remedy.

VIOLATION OF THE POLICY.

This complaint came within the rule of no mutuality. There can be no question but that the rule of mutuality is a necessity in cases of specific performance in Minnesota for the rule was laid down in the case of *Alworth v. Seymour*,

42 Minn. 526, by Judge Mitchell, the same effect as the Federal decisions.

That was a case of a demurrer to the complaint which was overruled by the court below; it was there claimed that defendant was a resident of Ontario, Canada, and was the widow of Pat Seymour, late of Brainerd, Minn. He died intestate seized of certain lands in Brainerd and Duluth and possessed of at least \$3,000 in personal property. It was averred that the lands were, on April 12, 1889, and ever since, in the possession of other persons claiming to own them, and that the defendant never had the means wherewith to establish her title; that until June, 1889, she had no knowledge or means to discover the property left by her husband; that plaintiff was in the abstract business, examining and perfecting defective titles; that by letter of April 12, 1889, he offered "to do all the work of looking up the property in which defendant has an interest, and settling it up, pay all expenses connected therewith, for defendant, without charge to her unless plaintiff should succeed therein; and, in case of success, defendant should divide the property or money obtained equally with plaintiff, first deducting from the gross proceeds the necessary expenses and disbursements of plaintiff therein."

The defendant accepted that offer by letter, retained attorneys to help him in the work of prosecuting litigation performing services worth \$100; became liable to attorneys for services of another \$100, but the defendant refused to proceed with the work under the agreement and repudiated it, and gave to another person a power of attorney to convey all of her interest in Minnesota lands; her interest in her husband's lands was worth \$25,000. She had no other means and the action was brought to compel her to specifically perform the agreement and to enjoin her from parting with any of her husband's lands until she complied with it, and to have the contract made a lien upon the lands.

Judge Mitchell said:

It being, therefore, a case of a mere agency or naked power, the defendant had the power (as distinguished from the right) to revoke it at any time. Of course if she revoked it without right, plaintiff would have his action for damages for breach of the contract, if a valid one. *Mecham*, Ag. §§207-209; *Huntv. Rousmanier*, 8 Wheat, 174; *Gilbert v. Hol*, es, 64 Ill. 548; *Hartley's Appeal*, 53 Pa. St. 212; *Barr v. Schroeder*, 32 Cal. 609. (2) But, even assuming that the contract created a 'power coupled with an interest,' still the court would not decree specific performance, because, from the very nature of the contract it would not enforce complete performance by both parties. In other words, there is no mutuality of remedy. It calls for the personal services of the plaintiff as agent for the defendant. These services are as yet mainly unperformed. The court has no power by its decree to compel him to perform them, much less to direct how he shall perform them; and specific performance will not be decreed unless the court can at the time enforce the contract on both sides, so that the whole agreement will be carried into effect according to its terms. If this cannot be judicially secured on both sides it ought not to be compelled on one side, and the other party left at liberty to perform or not, or to perform in such a way as suits his own interests. *Fry. Spec. Perf.* §§ 440; *Pom. Eq. Jrr.* §1405, and *nots. Pom. Spec. Perf.* §§165, 166."

A further discussion of this question appears in *Palmer v. Gould*, 39 N. E. 378, in the New York Court of Appeals in the transaction of a sale.

And again in *Ida v. Brown*, 70 N. E. 101, it was claimed that a guardian had agreed with his ward, who continued to live as a member of a family with a person with whom she had always lived, in the position of a daughter, but this was held to furnish no consideration for a promise by such person to bequeath to her at his death a specific sum and devise to her the house and lot in which he lived so that upon his death with a failure to fulfill that promise, equity could decree specific performance. There are three opinions in that case, one by Judge Haight, who points out the diffi-

culties about an agreement being made under those circumstances to involve a child long after it reached its majority.

The same difficulties certainly prevail as to a married woman or as to contracting as to her children, although the opinion of Judge Gray seems to turn somewhat upon want of power and had promised to treat him as a son and had also stated that whatever worldly wealth he had should be divided equally between this boy and the two daughters.

The court said:

“Assuming that the trial judge believed that the appellant and his mother intended to tell the truth, still, owing to their deep interest, it would be unsafe to base a finding on their testimony when it may be followed by such grave consequences.”

In this connection, it may not be amiss to call the Court's attention to the fact that there is probably no other line of cases claimed to depend upon contract wherein the evidence of an oral nature is so uniformly consistent, and why? Is it because the parties who make those contracts are more consistent in their logical arrangements? Judges of trained minds differ more in their reasoning and more in their statements of cases than the statements of facts claimed to be contracts of an oral nature in the average cases where specific performance is asked. Such cases are dangerous as this similarity of evidence indicates. They are similar in that their testator is dead and cannot speak from his grave; they are similar in a disposition on the part of those who are not otherwise lawfully entitled to the estate to claim an interest; they are similar in that the dangers of being caught at misrepresentations are far less than in most cases; they are similar in that the lines of demarkation as to when specific performance is meant upon the theory of part performance have been well known where the case has gone the ordinary trend without delving into the basic principles underlying them.

The case was meant to be similar in the complaint, but the plaintiff could not fully stand up to it.

The *Ide* case is illuminative. It points out the comments of Chancellor Kent on *stare decisis*, as follows:

"He added that 'it is probable that the records of many of the courts of this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired and the beauty and harmony of the system destroyed by the perpetuity of error.' 1 Kent's Com. (13th Ed.), 477."

Continuing, Judge O'Brien says later on in his opinion:

"When the testator made the will disposing of his estate, he supposed that the law of the land was that he had the right to do what he would with his own, but in this, it seems, he was mistaken. He did not suppose that his will could be destroyed by calling a single witness to testify to a verbal interview with the testator, wherein it is said he promised to make another and better will. It seems from this case that the witness was not able to state the words of the interview, but only what he calls the 'spirit and sentiment', and, that having been made to appear in the way suggested, a court of equity is asked to proceed and tear up the will as made, and substitute the verbal arrangement in its place, in whole or in part. If this can be permitted, it is pertinent to ask what becomes of the sacred right to make a will and have it respected, which this court asserted with so much vigor in *Dobie v. Armstrong*, 160 N. Y. 584, 55 N. E. 302? Of course, no man, old, rich and childless, can safely make a will, if it is always to be open to attack after his death, not, as heretofore, on the ground of incompetency or illegality of its provisions, but upon some kind of vague proof of a verbal arrangement to change it, or to make another will more favorable to strangers in blood, who may think they are equitably entitled to share in the estate.

Again in *Wadick v. Mace*, 83 N. E. 571, the Court of Appeals of New York said:

In the various text-books and innumerable cases which deal with the subject of specific performance no rule is more clearly or positively stated than the rule that a contract must be mutual in its remedy in order to warrant a degree for specific

performance thereof. "It must be in general," says Prof. Pomeroy, "mutual in its obligation and its remedy." 4 Pomeroy's Equity Jurisprudence (3rd Ed.), § 1405. This statement has been quoted with approval again and again by the courts in this and many other states. The same learned author, in another work, declares that, if a contract cannot be specifically enforced against one of the parties, then and for that reason he is not entitled to the remedy of specific performance against his adversary. Pomeroy on Contracts, § 163. In *Palmer v. Gould*, 144 N. Y. 671, 39 N. E. 378, the court declared it to be a well settled rule that the specific performance of a contract for the sale of lands will not be decreed if the remedy be not mutual. The same doctrine was asserted by this court in *Stokes v. Stokes*, 148 N. Y. 708, 43 N. E. 2211, *Mahaney v. Carr*, 175 N. Y. 454, 67 N. E. 903, and *Idc v. Brown*, 178 N. Y. 26, 39, 70 N. E. 101."

As stated by Judge Thayer in *Norris v. Fox*, 45 Fed. 406-407:

"The rule is fundamental that a contract will not be specifically enforced unless it is obligatory on both parties, nor unless both parties at the time it is executed have the right to resort to equity for its specific enforcement. *Marble Co. v. Ripley*, 10 Wall. 340; *Bodine v. Glading*, 21 Pa. St. 50; *Duball v. Myers*, 2 Md. Ch. 401; *German v. Machin*, 6 Paige, 286; *Boucher v. Vanbuskirk*, 2 A. K. Marsh, 345; *Duff v. Hopkins*, 33 Fed. Rep. 599-608. And where a contract when executed is not specifically enforceable against one of the parties, he cannot, by subsequent performance of those conditions that could not be specifically enforced, put himself in a position to demand specific performance against the other party."

Certainly nobody can contend in this case in the light of these decisions that there was any mutuality of remedy at the time this alleged contract was claimed to have been made with Peter B. Smith, nor was there any mutuality of remedy or specific performance at the time when the alleged modification is claimed to have been made.

Not Enforceable as Against a Wife.

Specific performance of such a contract will not be granted against a wife who marries after it is made.

Mr. Smith did not tell her of such deal, but that Bess and the boys would undoubtedly leave soon, (Rec., p. 470).

Owens v. McNally, 33 L. R. A. 369 (California).

In the above case, the court had such a contract under consideration, and said:

"A specific performance of this contract cannot, therefore, be decreed without sweeping aside, as of no moment or avoid, the rights of the wife and widow, vested under a contract most strongly favored by the law. Specific performance, as we have said, is not to be decreed under strict rule and formula. Every consideration which may properly be urged upon the court is to be weighed and passed upon, and it will be decreed only when no other adequate relief is available to plaintiff, and even then it will be denied if it operates by way of a hardship upon the innocent. So, while this contract was not void, as against public policy, at the time it was entered into, it must be held that the parties to it contracted in view of the fact that a subsequent marriage by Lawrence McNally might be consummated, and that the effect of this marriage would be to compel a court of equity, in justice to the widow or children, to deny specific performance. Or, viewed in another way, it must have been within the contemplation of the parties that Lawrence McNally might marry; for the contract could not have been designed as a restraint upon his marriage, or it would be void. If it was within their contemplation, and the contract embraced the taking of the deceased's entire estate to the exclusion of any future wife or child, then we have no hesitation in saying that the contract was void as against public policy. The only permissible conclusion is, therefore, that the parties contracted in contemplation of that event. Upon its happening the rights of innocent third parties intervened, and a decree of specific performance could not be awarded. *Gallv. Gall*, 46 N. Y. S. R. 806." *Owens v. McNally*, 33 L. R. A. 369-373.

If there was an agreement it involved getting a divorce and was void.

The plaintiff's evidence quoted above gave as the consideration for the alleged agreement that she should get a divorce, (Rec., pp. 317-318), not the charge made in either complaint and we objected there on the ground of variance and public policy, (Rec., p. 492).

Undoubtedly, it is the rule of Minnesota, as elsewhere, (9 Cyc. 519), that such an agreement is void as against public policy.

Adams v. Adams, 25 Minn. 72 (9 Cyc. 519, note 12).
McAllen v. Hodge, 94 Minn. 237.

PUBLIC POLICY OF MINNESOTA.

The General Statutes of 1894, with respect to personal property, were compiled from Section 70, Chapter 46, of the Laws of 1889, as amended by Section 6, of Chapter 116 of 1893.

This Section 70 is out of the chapter designated 46, which in fact is what is known as sub-chapter 4 of Chapter 46, better known as "An Act to Establish a Probate Code."

This Section 70, as it read in the Probate Code thus established, was as follows:

"When any person dies possessed of any personal estate, or of any right or interest therein, not lawfully disposed of by his last will and testament, the same shall be applied and distributed as follows:

6. The residue, if any, of the personal estate shall be distributed in the same proportion and to the same persons and for the same purposes as prescribed for the descent and disposition of real estate."

It is noticeable that this statute excepts only that descent made by a last will and testament and puts it in the same persons and in the same proportions and for the same purposes as to real estate.

When the General Statutes of 1894 put this provision into 4477, an error was made as to codifying this with the amendment which had been made in 1893.

That amendment in 1893 struck out of section 70, before

the first subdivision thereof, the words "not lawfully disposed of by his last will and testament," which may have looked significant had it not been that it added to the Section 6: "(Except as otherwise disposed of by the last will of any deceased person."

This probate code was enacted in 1889. The amendment made in 1893, and the striking out of the clause in Section 70 at the head thereof might indicate that it was the purpose to deprive all the other legatees of the benefit of the clause, but to preserve it to the widow and the heirs at law, the same as it would be preserved in real estate, in order to protect the magainst such actions as this.

DESCENT.

The General Statutes of Minnesota for 1905, Sections 3646, etc., provide for the descent of property where there is no will:

"When any person dies seized of any lands"
* * * *

"The homestead of such decedent shall descend, free from any testamentary or other disposition thereof, to which the surviving spouse, if there be one, shall not have consented in writing, and exempt from all debts which were not valid charges thereon, at the time of such death, as follows:

1. If there be no surviving child, nor lawful issue of any deceased child, to the surviving spouse, if any."

Section 3648 of the Revised Laws provides:

"The surviving spouse shall also inherit an undivided one-third of all other lands of which decedent at any time during coverture was seized or possessed, to the disposition whereof, by will or otherwise, such survivor shall not have consented in writing."

Then follow certain exceptions which do not include any such exception as Mrs. Price attempts to ingraft upon our statute.

A provision is then made for the children, and then it is provided that if there be no children:

"Then the whole estate shall descend to such spouse."

Section 3649 gives to the surviving spouse the privilege of electing to take under the statute or by will.

Under the General Statutes of 1894, of subdivision 6, including the former amendment to Section 70 of the Probate Code of 1889, it was held in the Supreme Court in the case of *Percy v. Hunt*, 88 Minn. 404, that it does not prohibit the husband from disposing of his personalty by will. To avoid this necessity when the laws of 1905 were revised, subdivision 6 was so amended as to make it read as follows:

"The residue, if any, of the personal estate shall be distributed as follows: one-third thereof to the surviving spouse, if any, free from any testamentary disposition thereof to which such survivor shall not have consented in writing; the remainder of such residue, or, if there be no surviving spouse, then the whole thereof, except as otherwise disposed of by will, shall be distributed in the same proportions to the same persons and for the same purposes as prescribed for descent of real estate by Sec. 3648, subd. 1-6."

Subd. 6 of Sec. 3653, Revised Laws Minn. 1905.

This makes it exceedingly clear that under the laws of Minnesota as they now stand a husband cannot even will away more than two-thirds of the personal property without the consent of the wife in writing thereto, and that he cannot dispose of it in an other manner than by will to prevent her taking the whole thereof where there are no children.

Section 3653 provides:

"When any person dies owning personal property or any interest therein, the same shall be disposed of and distributed as follows:

(After making certain provisions as to the wearing apparel, debts, etc., it is provided in subdivision 6:)

The residue, if any, of the personal estate shall be distributed as follows: one-third thereof to the surviving spouse, if any, free from any testamentary disposition thereof to which such sur-

vivor shall not have consented in writing; the remainder of such residue, or, if there be no surviving spouse, then the whole thereof, except as otherwise disposed of by will, shall be distributed in the same proportions to the same persons and for the same purposes as prescribed for descent of real estate by Sec. 3648, subd. 1-6."

The mere reading of this section shows us that it is the policy of the State of Minnesota that the homestead shall descend, where there are no children:

"Free from any testamentary or other disposition thereof to which the surviving spouse * * * shall not have consented in writing."

It is also clear from this section that it is the purpose that this homestead shall descend to the surviving spouse free from debts.

As to the other lands which are made subject to the payments of debts, it is provided that:

"The whole estate shall descend to such spouse" * * * of all lands * * * "to the disposition whereof by will or otherwise such survivor shall not have consented in writing."

The mere reading of this statute would also indicate the policy of the statute of Minnesota to be that the wife should receive these lands as a matter of law whether the disposition be made "by will or otherwise."

This section is amended by the General Laws of 1907, Chapter 36, which does not materially affect this question.

As to the personal estate it provides that it, too, shall descend free from any testamentary disposition to which "such survivor shall not have consented in writing."

Under section 3649 it is provided in effect that unless she renounces the will within six months, in writing, "such spouse shall be deemed to have elected to take thereunder."

This section is the outgrowth of our previous statutes, recognizing the principle that the wife may elect to take these statutory provisions even though the will be made to her of less favorable conditions.

It is perfectly clear from these statutes themselves, unless there be some unintentional, judicial obstructions under the so-called theory of interpretation, that it is the policy of the State of Minnesota with respect to the descent of real estate, and with respect to the descent of personal property, that the spouse shall, as a matter of law, be entitled to choose whether she will take under the will or shall elect to take under the statute; and that if she does elect to take under the statute, no disposition of such property to which she has not consented in writing, whether made by will or otherwise, as to the real estate, shall affect her rights; and that she shall be entitled to the residue of the personal property free from any testamentary disposition to which she has not "consented in writing."

As this law read with respect to the personal property in the statutes of 1894 it was:

"The residue, if any, of the personal estate shall be distributed in the same proportion and to the same persons and for the same purposes as prescribed for the descent and disposition of real estate."

There was an omission in the print as it should have had following it, by chapter 116, section 6, of the Laws of 1893, an amendment which would have added to the end thereof:

"Except as otherwise disposed of by the last will of any deceased person."

This makes it perfectly clear that it was the intention of that act in that amendment to allow this property to descend under such circumstances, unless disposition was made of it by will.

By chapter 36 of the General Laws of 1907, section 3648 of those laws is again amended as to real estate, again showing the policy of the state to be, that where there is no child, or issue of a child, and a surviving spouse, the land shall go to the spouse, except in cases where the spouse has con-

sented in writing by will or otherwise, with the few exceptions therein mentioned.

In *Howe Lumber Co. v. Parker*, 117 N. W. 518, in speaking of the policy of the law of Minnesota with respect to the widows' rights under our statute, Mr. Justice Elliott says:

"The general policy of the law contemplates that the wife shall take either as widow under the statute or as legatee under the will. A condition by which she takes in part under the will and in part under the statute is anomalous, but nevertheless permissible, if such is the desire and intention of the testator. In order to avoid such results being brought about by doubtful construction, the legislature in 1893 amended the statute which provided for an election by a surviving husband or wife by adding thereto a proviso to the effect 'that no devise or bequest in any last will or testament to a surviving husband or wife shall be taken to be in addition to the right or interest secured to such survivor by statute in the estate of such deceased person, unless such clearly appears from the contents of the will to have been the intention of the testator or testatrix.'"

Howe Lbr. Co. v. Parker, 117 N. W. 519.

This fixes the opinion of our Supreme Court so that the policy as it sees it is the same way as we here construe it.

In connection with these decisions, the opposite to which we have not found, when a wife is involved, voicing as they do the sound principle of public policy, we have but to see if it is consistent with the policy of Minnesota, as evidenced by our legislative department; for the legislative and not the judicial department is the one having the first right to act upon questions of public policy.

The policy of a state is made by its constitution, laws and decisions. If the political department speaks within its constitutional authority, it binds the courts.

See Board of Sup. v. L. I. & C. Co., 93 U. S. 619.
Hartford Ins. Co. v. C. M. & St. P. Ry. Co., 70 Fed. 201 (30 L. R. A. 193).
U. S. v. Trans. Mo. Freight Assn., 166 U. S. 341.
U. S. v. No. Sec. Co., 120 Fed. 721.

Judge Sanborn in the case of *Hartford Fire Ins. Co. v. C. M. & St. P. Ry. Co.*, 70 Fed. 201, (30 L. R. A. 193), speaking for the court of appeals, said:

“The public policy of a state or nation must be determined by its constitution, laws, and judicial decisions; not by the varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public. *Vidal v. Philadelphia*, 43 U. S. 2 How. 127, 197, 11 L. Ed. 205, 233; *United States v. Trans-Missouri Freight Assn.*, 7 C. C. A. 15, 73, 58 Fed. Rep. 58, 24 L. R. A. 973, 4 Inters. Com. Rep. 443, *Swann v. Swann*, 21 Fed. Rep. 299.’

“*Hartford Fire Ins. Co. v. C. M. & St. P. Ry. Co.*, 70 Fed. 201 (30 L. R. A. 193).”

Now the policy of Minnesota has been declared by its legislative department. It has pointed out in that department by statute that the State of Minnesota will not tolerate the making of a will which will deprive a widow of more than two-thirds of the personal property, without her consent, and that it will not permit a disposition of any portion of the personal property away from the wife, where there are no children, *except by will*.

The statutes of this state—consequently the public policy—prohibit the making of a will except as above shown; they also prohibit such contracts because:

(a) They provide that the wife may elect to take her statutory interest in lieu of the will.

(b) The real estate cannot be taken from her by will or otherwise—when no children—without her written consent.

(c) Only two-thirds of the personal property could now be taken from her by will, and none of it *except by will*.

THE PUBLIC POLICY OF MINNESOTA AGAINST SUCH CONTRACTS IS THUS FIXED.

No more dangerous principle could be established than to allow a rule once invoked to prevent peculiar hardships to be so extended as to allow innocent wives and children to be deprived of their support by the oral testimony of a married woman, who perchance may have been the object

of general contributions, but who yet has a father and one divorced husband to aid her.

**IF A WILL WAS MADE IT COULD NOT BE REVOKED BY
SUCH ALLEGED CONTRACT.**

It is also provided by section 3665 as follows:

“No will in writing, except in the cases hereinafter mentioned, shall be revoked or altered otherwise than by some other will in writing, or by some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses; but nothing in this section shall prevent the revocation implied by law from subsequent change in the condition or circumstances of the testator.”

Section 3665, R. L. 1905.

By section 3666 it is provided:

“If, after making a will, the testator marries, the will is thereby revoked.”

This matter of public policy seems not to have been raised in the Minnesota Supreme Court decisions. Neither has the point of no mutuality.

MINNESOTA DECISIONS NOT MINNESOTA LAW.

The case of *Newton v. Newton*, 46 Minn. 33, was decided in 1891. It was evidently decided without any reference to this statute and without the point of public policy or statutes being raised, but upon an old line of equity cases, and upon the theory that that contract was as valid as any other contract.

The point of statutory prohibition or that of public policy was not mentioned in the opinion.

An examination of the brief of appellant confirms the opinion in showing that the point was not raised.

The question of enforcement of such contracts next came before the court in *Svanburg v. Fosseen*, 75 Minn. 350. In that opinion Judge Buck says that the questions were:

1. Statute of frauds.
2. Did the probation prohibit the action?

Again the court rests its decision upon cases of other courts not even having the *Newton* case mentioned in the opinion. The five opinions in that case do not mention either the statutes or the *Newton* case.

The *Newton* case was cited in respondent's brief.

In the brief, section 4423 of the Statutes of 1894 to the general statement that he was bound by the contract; but even this was under the heading which simply raised the question of whether the will when probated was conclusive.

The statute is not cited by the appellant to our contention and the point was not decided. This decision was in 1899.

The first *Fosseen* decision was on demurrer where a stipulation was made by others to abide by the result. The case was brought up for trial and was dismissed by Judge McGee for defect of parties. The Supreme Court, in *Rudd v. Fossum*, 82 Minn. 41, reversed the decision upon that ground, saying.

"Passing all other questions," etc.

Our point was not made in that decision.

The briefs do not raise the question.

The question of such contract next approved in the Supreme Court in *Stellmacher v. Bruder*, 89 Minn. 507. The opinion cites the *Newton* and *Fosseen* cases; it denies specific performance on the facts.

The consent of the father was there obtained.

The respondents make the point of public policy without citing any statutes or authorities to it.

The other Minnesota case is that of *Laird v. Vila*, 93 Minn. 45. The court cites itself in the other cases to show that the rule is decided. It does not cite the statute upon the point.

The briefs do not make our point.

Strange as it may seem, these statutes seem to have been overlooked by the profession and ignored by the court in the all pervading search for precedents as distinguished from law.

None of the cases in Minnesota, so far as we can find, and we believe no former ones, pretend to discuss any of the questions from the standpoint of public policy, under such statutes, or the fact that the statute is the exclusive method, but they seem to rely upon the old cases where no such statutes existed and where no such public policy had been manifested.

These statutes could have had no other purpose than to prevent just such actions—to declare a policy which would protect families irrespective of other claims.

All lawyers of experience, as well as all thoughtful legislators, have observed that unscrupulous persons feel that estates of the deceased are legitimate prey for violated oral promises, the truth of which they believe is sealed with the lips of the dead.

But to secure the orphans' bread and the widow's peace and honor, the state says *no*, her laws say *no*, the court must say *no*.

Add to this the policy with respect to marriage, the duties of a wife to her own husband, and the dangers of such litigations cannot be over-estimated.

III.

THE TRIAL COURT APPLIED THE PROPER RULES OF EVIDENCE AND MADE THE RIGHT DECISION.

We call attention, therefore, to the following things:

1. The decision below, which is found in *Price v. Wal-*

lace, 224 Fed. 576, is correct in its interpretations of the rules of evidence and principles of law and the facts of this case; and it is substantial justice on the merits.

2. The matter of the admission or the rejection of evidence under those circumstances, as previously pointed out, is immaterial, for it would not have varied the results.

The alleged third error, amounts to nothing.

Counsel, without citations to the record, challenge the refusal of the court to admit a letter of one C. A. Brown. If we turn to the record, we find that he produced that letter as Exhibit F, (Rec. p. 445), and asked the defendant if Mr. Brown was authorized to speak for her and was given a negative answer, (Rec. p. 445), and he produced no evidence whatever of any relations between Mr. Brown and the defendant or any authority to speak for her, or any knowledge of accuracy, but presented the letter itself, and offered it in evidence, and upon our objections, (Rec. p. 445), the court properly ruled it out, (Rec. p. 446). Counsel has an exception there although he had not pointed it out in his assignment of errors, or argument, so far as we have observed.

Under these circumstances, we observe that this document is the worst sort of hearsay, and is clearly immaterial and lacks foundation as much as the letter of any third party could lack those things under any circumstances in any lawsuit. If the plaintiff could have presented this letter, then the defendant could have written to various people throughout the United States, telling them of the way in which she had been mistreated by the plaintiff and could have gained their sympathy without any hearing from her or if she had not have gained their sympathy, could have obtained letters couched in diplomatic language in the hope of ending the lawsuit, and could have presented those letters as evidence in behalf of the defendant. This letter is so utterly foreign to any principle of evidence in the American courts as to require absolutely no discussion; but whether

its exclusion was right or wrong, is wholly immaterial, for it could not have affected the result of this lawsuit. There was nothing in it of any definite nature as to any trusteeship or property taken over in trust or anything of that sort, which any court of equity could say was any foundation for a decree if it had been written for a party himself, and if it could not control the result it makes no difference.

Migeon v. Montana Cent. Ry. Co., 77 Fed. 249 (9 C. C. A.)

Engelstad v. Dufresne, 116 Fed. 582 (9 C. C. A.)

IV.

NO ERROR IN EXCLUDING INVENTORY.

Counsel assigns as error, again without citation to the Record, (see his assignment, Rec. p. 116), Appellant's Brief, p. 37, or his index to Record, that the court erred in not admitting the inventory of the estate of P. B. Smith in evidence. We cannot to the time of press find but that this is abandoned. The introduction of this inventory unless and until the court should order an accounting, was not necessary, if at all. The answer admits the amount of the estate of the deceased as it went through the Probate Court. If it is true, as was claimed, that the estate was larger than estimated in the probate Court, still the inventory would only give the estimate in the Probate Court. It could not have served any purpose as to details of the estate that was put into the Probate Court for they appear in the first complaint page 57 of the Record in the Minnesota Court and that was in evidence. And they appear in the 17th sub-division of plaintiff's complaint, on page 19 of the present complaint, and they are admitted in paragraph 17 of page 45 of the answer in this case; and it is there set up that the only property not included in that inventory was the note of plaintiff which was given to her and one item of eight shares of bank stock that were overlooked, and that was substantially the same as the mining stocks which were worthless, but were

erroneously appraised. Counsel had the opportunity to examine the defendant as to whether there was outside property, and they produced no evidence of any other property. Without a decree, therefore, of specific performance, and a decree for an accounting there could be no possible use of going into the matter of what the defendant got further than this. But at any rate, error or no error, it was immaterial for under the decisions cited in the last subdivision above, it was nothing which could have controlled the result and therefore harmless. If the plaintiff was not entitled to recover, then it mattered not what the defendant got. If the plaintiff was entitled to recover, then the evidence showed no outside property that could be in any way found by introduction of that inventory and all of the facts contained in the inventory were in the Record by admissions. This point is little short of frivolous.

In conclusion, then we have not the story of a man of two families bound to him by the laws of either man or God, but the story of a hard-working business man with one family whom he loved and was bound by all the laws of civil society to protect. There has passed into and out of his home a stepdaughter by a former marriage, whom his generosity had protected against the necessity of a struggling, professional start and the evils of a husband's dissipation. He had loved the children and liked them to his death. That stepdaughter had dispelled his love for her; had wasted his substance and brought sorrow to his last years; he had appealed to her relations, but they let her go among strangers; he had contributed till she married; he contributed to the boys till she built a home in which he aided; she had passed the boys to the protection of an adopted father and grandfather and within his lifetime he found freedom from care.

He took them from his will and gave his property where it belonged—to the appellee, who had helped to accumulate more than half; had loved and cared for him until and in

his years of wasting health, and through her love legally and intentionally evidenced had inherited his property, before the appellant had become estranged from a second husband and gone to her natural home with a father whom the deceased relieved of her support in her expensive years, a place where her extravagances can be checked and the boys given self-reliance, health and education—a fruit farm on the Pacific slope.

Upon the other hand, for nine years the appellant has pursued the appellee with unfounded claims and unreasonable charges to get something for nothing.

The decree of the lower court was in accordance with justice and the only decree that should be rendered in this case for the following reasons:

1. There was no contract such as the plaintiff claimed.
2. Consequently, there was no modified contract.
3. There was no agreement upon the part of the defendant, either to give up her husband's estate or to take it in trust.

4. The defendant and her family were much more than compensated for any services which they rendered to Mr. Smith, and the services were of such a nature that a claim could have been presented for it in Probate Court. It was not meritorious; it was within the Statute of Frauds; it was against the rules of mutuality; it was inequitable; it was against the understanding of deceased; it was against his will; and the sort of an action which a court of conscience ought not to favor on the merits.

5. The matter, as presented to the Minnesota court, was decided adversely to her in that court. Six years elapsed. One witness to the will of 1902 had died; one witness to the last will had died; the man who kept the last will for the deceased and who delivered it to the defendant as a surprise to her after Mr. Smith's death, had himself died; the plaintiff had made no such claims during the lifetime of Mr. Smith when he himself was sending her away and stopping

the allowance for her, and the boys, in a manner that would have been inconsistent with the contract, had one been made; the estate had been probated without claim of the plaintiff; there was no corroborative evidence of any contract, and no definite arrangement shown; the defendant had married the plaintiff without any knowledge of any claim and had probated the estate, and after the action was decided her way, had married again, and the plaintiff was bound not only by the Minnesota decisions but by the rules of laches and estoppel after keeping quiet until those valuable witnesses had died, and attempted to go to Oregon, where she hoped the rules were liberal, to make a second prosecution of her case.

If the full faith and credit clause of the Federal Constitution is not observed with respect to the Minnesota judgment, then there is no reason why it should be observed as to the decision rendered in this case, and the plaintiff may go into the state court or wait until she gets the defendant within the jurisdiction of another state or another federal court and keep on indefinitely her method of prosecution; and why? Counsel asks to let them use the letter of Mr. Brown that informed her that she could not coerce or cajole the defendant into a settlement and was not likely to get results out of a contingent lawsuit.

Without, therefore, yielding any deference to the conscience of a court of equity, or denying the ambitions of counsel to have this court say that it is required to administer Divine law, we suggest that neither equity nor Divinity can turn falsehood into truth with eloquence alone as the basis.

And if the time ever comes when stories like this, under circumstances like those in this Record shall compel a court of equity to reverse a decision upon such a Record and for such reasons as are given, it will then be time to modify the rules by which records are measured, be they human or Divine. If the plaintiff can recover in this case, then the

security of every estate in the land could easily be attacked by the slightest maneuvers in the lifetime of its owner, and irrespective of the statutes which require the formalities of the lines of descent and allow a man to make his will as he pleases.

Respectfully submitted,

Esther Hood
Hood M. Hood
Esq.
Esq.
Esq.

No. 2849

IN THE
**United States Circuit Court
of Appeals
For the Ninth Circuit**

ELIZABETH M. PRICE,

Appellant,

vs.

MARIE DEWEY WALLACE,

Appellee.

**Appellant's Petition for Re-Hearing
and Certificate of Counsel**

Upon Appeal from the United States District Court
for the District of Oregon

WM. H. HALLAM, Solicitor for Appellant

Filed

JUN 13 1917

F. D. Monckton,

Clerk.



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Upon Appeal from the United States District Court
for the District of Oregon

Appellant prays the court for a re-argument of the above entitled cause, upon the following general grounds to-wit:

(1) Unfounded judicial assumption of fact, whereby the decree is vitiated.

Twelve vital errors of fact in the judicial citations of the record, will be specified herein with full particularity.

(2) Unfounded judicial statements of law, whereby intolerable conflict and confusion have upset the rules of law and evidence in the same territorial jurisdiction. *The least error of law, is this: After 8 months deliberation this court finds irrefragable, evidently means clear and satisfactory*

(3) Fatal disregard of the instructions given by the supreme court to this court in the kindred case of Daniels vs. Wagner, 237 U. S. 547 to no other result, in the case at bar, than the triumph of a despicable fraud, and the shelter of an atrocious outrage.

By these deplorable errors, the miscarriage of justice is calamitous, and the conflict of laws is a reproach. I shall project the following comment at the opening, and sustain it at the close.

If the kingdom of evil which this defendant struggles to set up in equity, will not *stand*, without quite so much *variety* of judicial deviation from the facts of the record, then from every judicial consideration, let it fall with a *bang*, that your righteousness may surge *in* like the waves of the sea.

An "unfounded" judicial opinion is an *erroneous* judicial opinion, as the supreme court found the same to be, in Daniels vs. Wagner; and indeed when we reach the point where that postulate descends to the arena of challenge or debate, we shall have fallen on poor ways indeed.

High equity does not step *this* way aside from the *fact*, and *that* way aside from the *law*. Equity steps impressively *forward*, with indignant self-respect, on proper occasion, while it smites the traffic of those who defile the temple, and re-instates the reign of truth and law.

In support of these *propositions* and these *comments*, I beg leave to offer the following exposition:

I.

Something is withheld by the defendant, which was committed to her in sacred trust, for the family of Mr. Smith. Of this the whole record admits neither *legal* nor *actual doubt*. The faithless trustee must disclose the *terms* of the trust, or the law constructs that disclosure for her. Only by avoiding the record can any one resist these conclusions.

II.

Phenomenal instructions were delivered by the supreme court to this court in reversing this court, at 237 U. S., 547, Daniels vs. Wagner. The supreme court there stated rudimentary principles of fact and law to this court, with distinguished emphasis, and the persistent disregard of those instructions is indefensible. That case and this *agree in fundamentals*, albeit they differ in events. The two cases correspond; first, in the native malfeasance, which raises constructive

trusts in equity, and they correspond, second, in the “unfounded” judicial positions of fact and law expressly condemned by the supreme court there, and painfully obvious in repetition here.

By these judicial digressions, unlawful turpitude of the defendant had gone unwhipp’d of justice there, and by these judicial digressions, unlawful turpitude of the defendant, has gone unwhipp’d of justice here.

This petition will be based upon the facts of the record that are *known*, and *conceded*, and *confessed*; a line of contemporaneous *documents*, a line of *concurring witnesses* and *equities*, and for the defense of the defendant, a line of *confessed* perjuries, detestably *committed* and abjectly *admitted* after admission, was *compelled* by the accusing *documents*.

One typical illustration may suffice for the moment. On the witness stand, in the presence of the court, the defendant appraised her husband, at the value of a beast of the field, in the matter of his parental *constancy*, but when she met a letter of her agent, she confessed her impeachment, with abject abandon; a stirring incitement surely to judicial wrath (Rec. pp. 457-8).

Coming to the witness Wilbur Hartzell, she valued him as a perjured fellow (Rec. pp. 439-41), because he plainly told the court how she

one time *expressly confessed* unto him, the *trust lodged in her* by that fatherly love. (Rec. pp. 133-136). And when her *own witness*, C. A. Brown, is shown to have written a *contemporaneous letter* of the same tenor as Hartzell's *testimony* (Rec. pp. 605-6), she impartially bespatters *friend and foe*, an added incitement, surely, to righteous judicial indignation, and jealousy of judicial respect.

But, in a *long review* of the *evidence*, the court below goes *around* Mr. Hartzell *entirely*, at the very interesting point of the road where he gives the court that conclusive information; goes around this impeaching letter of the defendant's agent, with *its* unquestioned information; excludes, on the trial, this impeaching letter of the defendant's *witness*; omits *all* the defendant's *impeachments*; omits *her detection, confession and crime*; builds on her *perjuries*, omitting her *confessions*, and awards her the monstrous injustice she asks.

So it is always. The whole record is an *enlargement* of this *photograph*, witness letter and judicial oversight, perjury exposure and confession. So much thereof as to extend this petition beyond desirable length.

The whole shameless twenty-page answer of the defendant is a mere expansion of those false calumnies, which she *retracted in court* upon the

compulsion of the *writings*; so also as to her whole shameless thirty pages of direct examination; all one long drawn perjured slander upon her dead husband, and the stability of his parental affection, *first*, toward his “*daughter*,” and *second*, toward his daughter’s *babes*—perjury on the very face of it if Smith was any *man* at all, and perjury on *this defendant’s own unavoidable retraction and confession*.

Yet the marvel of the case is this, that the long opinion below, on which you build tracks with the defendant’s *perjuries*, and ignores the defendant’s *retractions*.

The phrases of Smith’s fatherly letters could not touch the *phrases* of the judicial *opinion below*, at any point, without *fire work*. Those good letters to his “adopted daughter” throughout his last four earthly years, not one of them more perfect than the very *last*, put those parental models of Smith’s composition anywhere within igniting distance of the composition of that long judicial *opinion*, and the *whole judicial fabric* which clothes your own decree, goes up in one light flash of flame (Rec. 592-598, and 94-114).

IV.

This court says we assigned error “in very general language,” but the court *omits all refer-*

ence to our assignment of errors *Number III*. That assignment of error is the full two and one-half page text of the portion of the record to which it relates, namely, the aforesaid letter of C. A. Brown (Rec. p. 115). This court does not rule upon that assignment of error *yea or nay*.

I will state this fact, *as a fact*. You cannot touch that assignment of error, on any side, or discuss it on any side, without revealing this defendant's whole story in the light of an execrable perjury, and her whole conduct in the light of a nefarious robbery.

This court, like the lower court, discloses neither that tell-tale letter which was *excluded*, nor the like testimony of Hartzell which was admitted.

What objection ^{*assigned or unassigned Rec. 115*} can be made to this letter of C. A. Brown, which was *excluded*, that could not be made to the letter of Ed J. Price to Jessie Carey Smith, which was *admitted* (Rec. pp. 17-19, Rec. p. 604)?

In any event, what is the ruling of this court upon the testimony of Hartzell, and upon our assignment of error concerning that letter?

The testimony of *Hartzell*, which *was admitted*, does the silence of both courts go to its *veracity* or its *legal sufficiency*? I have no way to *know*. But this much all may know, it is too

late now to question his veracity, after his testimony has faced the court below, unassailed these two years, and faced this court unassailed these nine months, and the unquestioned law of like cases is cited in my brief. The statement of Hertzell is *true*, and the corroborative statement of Brown is *true*, and the truth so revealed, stamps the defendant's whole *story* as *false*, and her whole *conduct* as *that of a false trustee!*

The court below *publishes* the testimony of *Mrs. Hartzell* and this complainant and calls those testimonies the "plaintiff's proofs" (Rec. pp. 109 and 107-8), but will you also publish that like letter of C. A. Brown, and that like testimony of Wilbur Hartzell, *and then say there is no fraud here?* You have *not* done that, and, it cannot be *done*. Hard to explain that evidence? It is impossible to explain it. There is no way to disclose that evidence and decide for the defendant. The court has *avoided* this case—*not* decided it.

V.

Not a letter in this whole record do you deem "worthy of special mention," except the *spurious* or doubtful ink of *this defendant's own*. I call it spurious or doubtful because from the best recollection of her own witness it was spurious or doubtful (Rec. pp. 533 and 536), *and, in any event*, that ink was *more than four years*

old when Smith *died*, while Smith's *own last ink*, with its message of love and money and tenderness, was scarcely more than dry when he suddenly died.

"There is a lack of strength in plaintiff's case upon the most essential issue," says this court. There is no more essential issue than the *truth* which this *defendant confessed*, soon after Smith *died*, and the *perjury* she *confessed* on the *witness stand*. If the court does not disclose the documents that prove these things, what evidence *would* the court disclose? Too little evidence? Too *much* evidence for the consumption of the court. There is no way to reveal these undisputed facts, and also write an opinion in favor of the defendant. There *is* no way.

Smith's family affection, in the lapse of years, seemed to "drift away," swears the defendant, with nervous eagerness (Rec. p. 454). Those two words, "drift away," epitomize the defendant's whole long sworn defense, but within the next ten minutes, madam, you will *recant* and *retract* those soulless, rapacious words, every vestige to the *dot* of an *i*, when that contemporaneous *letter* of your talkative *agent* stares you in the face, "When your fear cometh as desolation and your destruction as a whirlwind." (Rec. p. 600.) You will end by *confessing* what, too, Smith's *own* very *latest letters* show beyond all

doubt, that to the *last hour* of his *life* the *complainant's status* in *Smith's mind* was that of his "*adopted daughter*," and, second, that down to the time of his last dinner with you, the defendant, the last night before his sudden death, he was "*very fond*" of the two boys, "*and very proud* of them, too (Rec. pp. 457-8). "*Proud*" signifies a buoyant, proprietary interest. You will confess, *verbalim*, madam, the *truth* of those words so quoted from *your agent's letter*. And so she *did*, and a long *answer*, and a long *defense*, collapse in their *whole repulsive* and *admitted decadence*.

Child robbery is merciless, and truth is merciless when it overtakes that infamy. Equity cannot be unprovoked by those loathsome crimes, for those loathsome motives, *committed* and *confessed before* her eyes, and *in* her forum. But here the court *saw* a wealthy *mother foiled*, *before* the court's *face*, in the black *endeavor* to strip a child *naked*, of *name*, and *place*, and *status*, and *purse*. You saw it, and human crime can sink *no deeper* than that crime which your eyes have seen confessed, and your hands have failed to reveal.

Child robbery before your eyes is a wretched defense to child robbery behind your back.

Such child robbery is *indescribable* and *pattern fails me* for the task in *hand*.

Where is the court? This court dwells now, where it dwelt in the cognate trust case of Daniels vs. Wagner., *supra.*, in a castle in the air, with no spot on earth for its lodgment or foundation.

VI.

There is no *conflict* in this *evidence*, as the *defendant* finally *leaves* the evidence, and leaves the witness stand, discredited and accused; no defense either upon the rules of *evidence* or the rules of *perception*.

Smith's will? Not so fast. Smith's will is not the hand maid of perjury, crime and oppression, under any rule of evidence, or any rule of honesty. Look at that a moment.

We claim a collateral family disposition—yea or nay? She must answer and she *has* answered in great profusion. She must stand or fall in *open battle of veracity*. She cannot hide a *perjury* behind a *will*. That back door is *closed*. Wrong *can* lose every avenue of *escape*. A case *can* be the same on both sides, and it *is* the same on both sides, when the *defense breaks* and *veers* clear to the side of the *complainant*, *whenever* it comes face to face with a contemporaneous *document*. On all the authority, this is *not* a suit to break a will (Cases cited in brief).

Those twelve judicial departures from the truth will very soon reveal *themselves*. For when

at last, with the legal burden of accounting for this iniquity upon her, the defendant in her impeachment and disgrace *actually says*: "I cannot account for it; no, I cannot account for it," (Rec. p. 460) courts of equity should then spend no long laborious opinion *accounting* for her unworthy defense, after all her *own* ingenuity and effort, as an accountant, is *exhausted* and *falsified*. Such judicial accounting, to the credit of the defendant, where the defendant herself has *failed*, can find no ledge of fact to sustain it, and in that novel judicial attempt, judicial aberration must *follow* as the *night* the *day*.

The best that can be done now would have been better save for this defendant's misdeed. The poison can never be removed entirely. And so long as monstrous evil in the world continues to rise up anew, the war of wisdom will be relentless and implacable; relentless and implacable in the blind, deaf madness of righteous anger. No plea more false and insidious than that falsest of all cries, peace, peace, where there is no peace, pardon and exoneration for the culprit when the culprit herself, discredited and defeated, will neither desist nor repent.

VII.

Let us notice here a *few unchallenged documents, laws and witnesses*; and let us view them, too, in the interpretative light that none can es-

cape, namely, *fourteen years substance of the parental relation*, which light the defendant finally concedes, and which light *Smith's tender letters show*, undimmed in its *golden glow* to the *eve of his death* (Rec. p. 597).

On that substance of the parental and filial relation, hang all the documents, witnesses, equities and legal presumptions.

"For love is lord of Truth and Loialtie." Abiding parental love, proved and conceded, will clothe the helpless family, as naturally and inevitably as the spring adorns and decorates the earth. That substance of 14 years is not the sport of a breeze, a word, a moment, an incident, a perjury, or a *system* of perjury and fraud.

Brutes leave nothing to their young. Men do. Smith was not the brute she swears he was to "drift away."

I have provided liberally for my daughter, said Smith to the *defendant's mother*, referring to Smith's first will, on the eve of his marriage to the defendant (Rec. p. 609). It is impossible that he could have had that conversation about the will with my mother, swears the defendant on the witness stand (Rec. pp. 461-62).

"I shall at the proper time provide for their suitable education, *wrote Smith*, of the boys in a *letter* (Rec. p. 592)."

"I expect to take care of them, feel toward them *as if they were my own boys and shall always provide for them*," said Smith to our witness Wilbur Hartzell (Rec. pp. 139-40).

"Dear Bess: Your *good* letter *just* received. You know how *dearly* I love Donald and Bobby, and that I will always take an interest in them," wrote Smith with inclosure of money, in one fair sample letter *three years after he married this defendant*, and six months *before* he made his last will (Rec. p. 595).

I would not have insisted on her getting a divorce from the doctor if I had not intended to provide for her and the boys, *said* Smith to Mrs. Florence Hartzell (Rec. p. 148).

"Donald . . you have got to leave this house, I will buy you a railroad ticket to any place you want to go. It doesn't make any difference where," says the defendant's witness Lauderdale, in quoting the very words of Smith, as Smith quoted his own words to Lauderdale (Rec. p. 521).

"The children are very dear to me, and it will make a big void in my heart to have them go," *wrote* Smith three years later in a letter (Rec. p. 592).

"When they went away we spoke of them very often *in a casual manner*," said the defend-

ant in her successful appeal *to the court!!* (Rec. p. 451.)

Smith was a man of his word, swears the defendant on the witness stand. Smith was a man of his word, says the court in the opinion below.

"Bess and the children *are well provided*," said Smith to Mr. Price, Sr., when he visited "Bess and the children" *four months after* he made his last will, at Mill Valley, California, and chatted with Price at Price's store," (Rec. pp. 130-31).

"I want him to have something from me on that day," *wrote* Smith to the complainant, 14 months after his last will was made, referring by "that day" to the birthday of the boy Donald. "I enclose a birthday present of \$25 for Donald, and think you had better use about \$5 for his birthday, and *you* can use the balance for something for the *house*." Closing "with much love to the boys, and kind regards to Ned. I am,

Yours lovingly, DAD."

wrote Smith in that same letter shortly before his tragic *death*, this being his very last parental letter to the complainant that can be found (Rec. p. 597).

His last parental message, and it is in black and white—good news to all but the defendant. What rich father could be more thoughtful and kind and considerate to all?

At that same time when that letter was written, there lay the will mentioning neither mother nor child. This naked will, without a supplement, does *not meet the conditions prescribed* by the supreme court of Oregon in Holman's Will, 42 Oregon, 363, as follows:

"A thoughtful consideration of *existing conditions . . .* and a *full* adjustment of his property interests from *his peculiar standpoint.*"

He never mentioned to me that last will, which changed his former will, and gave me his every dollar to me, says the defendant on her oath to the court.

He never breathed the good news to me, says the defendant on her oath.

His love of the children seemed to "*drift away,*" year by year, swears the same defendant on her self-same winning oath to the court.

To the day of his death "he was *very* fond of them and *very* proud of them, too," abjectly confesses the same defendant on her oath to the court, *when confronted* by a letter of her own providential agent (*supra*).

He never as much as *mentioned* Bess and the boys to me *once* that I can remember, in *all those last 15 months of his life*, after we last visited them at Mill Valley, swears the same defendant

in her self-same successful story to the court on the witness stand (Rec. p. 454).

Now, for heaven's sake, let us hear a little from some one else.

"I understand she has acknowledged *several times* that Mr. Smith *intended some provision* should be made for them (the children) and *relied upon her to carry out his wishes*," wrote C. A. Brown, the defendant's friend and witness, *soon after Smith died*" (Rec. pp. 605-6).

"Why, Mr. Hartzell, I think that is one of the finest things P. B. ever did. *He left it all to my honor* to take care of those boys, and I propose *to do it* and see that they have *good schooling*. But I can't do anything for *Bess now*" (Rec. pp. 133-136).

This conversation occurred at the office of the defendant's attorneys in Minneapolis, where Mr. Hartzell had been called, for conference, *just after Bess had sued* the defendant on her claim (Rec. pp. 439-40).

Not a word of truth in any of this, rejoins the self-same, self-discredited defendant, on the witness stand. All false.

The rule of law is this:

"A discrepancy between *declared intentions* and the *provisions of the will*, raises a *presump-*

tion, more or less strong, that the will does not speak the *mind* of the testator." Matter of Blair v. Daly, 540-549; 40 Cyc., 1154-55, and cases cited in brief.

By what possibility does this coiled, perjured, unconscionable defense elude that true and stable rule?

"Without some *explanation*, the purpose to ignore his immediate relatives would seem *strange* and *unaccountable*," says the supreme court of Minnesota, in the very late case of Woodville vs. Morrill, 130 Minn., 92; 97, 153 N. W., 131, 132. What becomes of *that* rule?

"No, I cannot account for that," says the defendant, finally, after her false and criminal effort to show a receding parental affection, on the part of Mr. Smith, was exposed and retracted. "No, I cannot account for it" (Rec. p. 460).

Let her then answer another question: Did the term "*my adopted daughter*," twice used by Smith in Smith's first *will*, define the complainant's status in *Smith's mind*, to the hour of his death? (Rec. pp. 609--585-86).

"I never thought much about it," swears the defendant (Rec. p. 483).

"Since she was forgotten in her adoptive father's will, she must be accorded the rights given

by law to a pretermitted heir," says the court in the equity case of *Thomas vs. Maloney*, 142 Mo. App., 193, 198; 126 S. W., 522-524, in a case of *virtual adoption, without a technical legal adoption*. No court ever stood against that tide. No court can.

"Neither can it be said . . . that because a court cannot decree the status of adoption, it may not adjudge *property rights equitably equivalent* to those *legally incident thereto*," says the supreme court of Minnesota in *Fiske vs. Lawton*, 124 Minn., 85-92; 124 N. W., 455, 458.

"*Certain disputable presumptions . . . are satisfactory unless overcome. . . . The following are of that kind:*

5. That evidence *wilfully suppressed*, would be *adverse* to the party *suppressing it*, if produced" (I Lord's Oregon Laws, 799).

By what mighty draught does she propel her iniquitous defense, to an equitable triumph over the prostrate body of all the facts and statutes and equity decisions?

VIII.

This court concedes that "a trust may be created and enforced where filial relationship is actually assumed."

In the case at bar, *was* a filial relationship *actually assumed*? Smith in that *solemn will* says *yes*; Smith in all his conduct to the *last* says *yes*. The defendant *does not deny* "I never thought much about it," is her furtive evasion, and this court does neither affirm nor deny. Again I say you have avoided this case—not decided it. No opinion of this court in Daniels vs. Wagner was ever more "unfounded" in point of *law* or *fact* than its opinion now at bar.

IX.

But *again* this court *departs entirely* from the case. The court says: "As there was no issue tried of a *legal adoption*, or claim of right by *inheritance* as an adopted child, *no error can be predicated* upon the refusal of the court to *make decision thereupon*."

Statutory adoption was *never* in the case. Such remarks are entirely extraneous, but virtual adoption is both *pleaded* (Rec. p. 4) and *confessed* (Rec. p. 483). There *can be* no issue on that which the defendant *confessed*, namely, a *virtual adoption*, the practical relation of "adopted daughter" at the end of Smith's life (Rec. p. 483).

We simply ask the enforcement and execution of that *law* which no court ever *denied*, to that *fact* which the defendant *does not deny*, but

this court, and the lower court, have *revealed neither* that undoubted *fact* just cited, nor that undoubted *law* laid down in Minnesota and Missouri *in the cases cited above*.

This court has avoided the unquestioned fact and the unquestioned law, which when put together leave no course open in equity, but to uphold the clear right and overthrow this mighty wrong.

Just as sure as you can read this whole record you can see that the defendant is covering up something and committing a family cheat here, and that, too, by the confessed crime of perjury. Perjury and detraction *so abominable*, upon exposure and confession *so direct*, should receive the *penalty* of the *crime confessed*, instead of a triumphal confirmation. The defendant should have been committed at once, when caught so falsifying the case at its vitals, come what *might* of her *undeserving defense*!

Something is covered up by her. Let her tell the amount or take the complainant's version, or better still, as she refuses to do either one, let her give the child the child's share, according to the presumption of law, which instead of *rebutting*, she has defied and enraged.

This undenied and undeniable parental substance of 14 years, is *not dissolved*, in *law*, by a

naked, non-committal will. Dismiss all other witnesses, if you choose. It takes more than one dubious looking circumstance, in point of law, after a man is dead and gone, to burn, and tear, and cancel, and obliterate, a life-long record of parental good will, good name, and good fatherly remittances, especially in case of an only child. That is the law. That much of law and respect are due to the dead man and the living truth. Do not judge and condemn the man, after a serviceable life, by one inconsistent but inconclusive event, lest you wrong both the living and the dead. Such is the clear mandate, both of statutes and equity decisions. *Believe* the departed when he professed and sent *forth*, in years of written letters, his pledges of family love and hugs and kisses. *Naturally*, Smith, *in such circumstances*, would remember *both* females, when they were the only two. Demand then, as the law requires, direct and clear accounting and explanation from her, who would pretend to, and profit by, a most unnatural and sudden and iniquitous eclipse of parental manhood and honor. Such a case never, never in equity went for the defendant.

X.

Smith's *first* will, which *remembered* the complainant, on Smith's *wedding day*, "*recognized the agreement*" according to New Jersey law, and

constituted a "*recognition of contractual obligations*," according to *Minnesota* law, and "falls but little short of the recognition of an obligation" according to *California* law (Appellant's Brief, pp. 66-67), and his subsequent instruction to the defendant, after he revoked his first will, according to contemporaneous writing and testimony that are clear beyond dispute, or accredited denial, remove all doubt of his obligation, to say nothing of the complainant's direct testimony of Smith's promise, under circumstances where no man worthy of the name could be *silent*.

A parental *intent* to give the child a "child's share" in such cases is *presumed* and *enforced*, and instead of *rebutting* that benignant legal presumption, this defendant only aggravates the presumption by her confessed perjuries, while *we fortify* the presumption, by conclusive documentary and oral proof of Smith *injunction* to the defendant, following his antecedent *promise* to the child. Slandering the family relation is a pitiful way to *demolish* the legal *presumption* of family *protection*. It only brings down that presumption with adamant weight upon the guilty head of the defamer.

Traducing the family love has no potency to *destroy* the family love, nor to destroy its natural and inevitable expression. But when the defendant, in her desperation, says "I cannot account

for it," after she has exhausted her ingenuity and veracity in *pretending* to account for it, she leaves *not one straw* in the *way* of those who *can* account for it.

Let 12 witnesses and twelve documents; then lash her tardy conscience into action. Her own witness, C. A. Brown, can account for it when he publishes in writing the defendant's *repeated confession* of a *trust*, and the subsequent impeachments of her *present oath* (Rec. pp. 605-6).

Wilbur Hartzell can account for it when he relates the defendant's like contemporaneous *admission to him* (Rec. pp. 133-36).

Mrs. Hartzell can account for it when she relates the defendant's *similar confession to her* (Rec. p. 154).

This complainant can account for it when she relates the defendant's similar confession to *her*, after she travelled, at once, from California to Minneapolis, following Smith's death, although not notified of his death by the defendant in time to attend her father's funeral (Rec. pp. 230, 231, 225-26, 559, 455-57).

The defendant *herself* can account for it, when she *enforcedly* makes divers confessions, *direct* to the *court* on the *witness stand!!!*

The decedent himself can account for it when he wrote the words "I shall provide," and fol-

lowed his pledge with four years of letters 'where-in he always *did* provide. The decedent himself can account for it by his impressive pilgrimage to Honolulu, that he might be present at the birth of his daughter's first child (Rec. pp. 182-85).

The decedent himself can account for it by his joyous visits to the complainant and the boys at Mill Valley, California, in later years, *before* and *after* his last will was made.

The decedent himself can account for it, when he felt the authority to expel the husband and father, and reclaim the daughter with her children to himself (Rec. p. 521).

The decedent himself can account for it, when "facile princeps" he gave his "glad" written "consent" to the daughter's later marriage to Price (Rec. p. 595).

Mr. Price Sr. can account for it when he relates how the decedent on one of those visits to Mill Valley, *after he had made his latest will*, disclosed to him the fact that provision had been made for the complainant and the boys (Rec. pp. 130-131).

Mrs. Lauderdale, *a near neighbor of Smith*, and deposing for the defendant, can account for it, when she concedes, on behalf of the defendant that she never knew the complainant's other name; that Mr. Smith treated the complain-

ant just as an own father would treat his daughter, and that the complainant's conduct toward him "was just as nice as his was toward her" (Rec. 548-49).

Mr. Lauderdale, likewise the defendant's deponent, can account for it when he fully corroborates his wife (Rec. pp. 528-29).

Emily Carlson, also a deponent of the defendant, honored by Smith's long employment, and Smith commendatory letter here in the record; this maid can account for it, when she, too, testifies *for the defendant*, and from her very heart corroborates Mr. and Mrs. Lauderdale (Rec. pp. 558-570, 596-7).

The complainant had not the means to take Minneapolis depositions, but we used the *defendant's* (Rec. p. 329).

The defendant's own mother can account for it when she unwittingly exposes the defendant's false and perjured suppression here in court, of her knowledge of the Fargo will (Rec. pp. 461, 608-9).

The complainant can likewise account for it, when she swears that this fugitive Fargo will, on the defendant's wedding day, gave the *complainant* much *less* than Smith had promised *her*, when he thrust out her husband, and less than he promised her again, on the morning after his en-

gement to the defendant (Rec. pp. 195-198, 212-213, 563-67, 528-29, 548-51).

The defendant can account for it, when she is so much more reticent about this Fargo will than her own mother.

The complainant can account for it, when she tells the undisputed truth, that this Fargo wedding will was concealed from her until long after Smith's death, and until it peered from its hole after the commencement of this suit now at bar (Rec. pp. 214-15).

Mrs. Wright can account for it when she testifies, on behalf of the defendant, that she does not so remember an *original letter* of Mr. Smith, in the tenor of the copy offered by the defendant in her own admitted ink, wherein the complainant is criticised in money matters (Rec. p. 533).

Jessie Carey Smith can account for it when she testifies, all too eagerly, on behalf of the defendant, and yet in direct contradiction of the defendant, when the defendant swears that a telegraph strike kept the defendant from notifying the complainant of Smith's death until the day of his funeral, the fifth day after he died (Rec. pp. 372-3-4).

The defendant herself can account for it by this nervous dread of the girl claimant, and by

this vain hope of keeping her from coming from California to Minneapolis.

Each of these twelve witnesses can account for it; seven of them her *own* witnesses, to-wit: (1) Brown, (2) Lauderdale, (3) Mrs. Lauderdale, (4) Emily Sarlson, (5) Mother Duncan, (6) Mrs. Wright, and (7) Jessie Carey Smith—and these five are ours: (8) Wilbur Hartzell, (9) Mrs. Hartzell, (10) Father Price, (11) Father Smith, and (12) this complainant.

And then those physical verities of the case; those Smithsonian remittances, assistances, voyages, journeyings, attendances, gifts, symbols, memorials, blessings, luxuries and benedictions; those hugs and kisses, engraven on the face of parental letters, and impressed on infant features; that *typical letter* to his daughter fervently indicating that the *pictures* of the two absent boys at Christmas, loomed *higher* in Smith's affection and imagination than all his *other* love tokens from other sources *whalsoever*. He so wrote (Rec. p. 594).

Those noble and visible *realities* of the case, stand in relief, like the mountains of God, in their imperial tints, while the defendant conducts you to her cavernous abode in the dampest diclevities, and whispers in your ear, "I cannot account for it."

XI.

Smith entrusted something to this wife for the benefit of his family, which the wife now withholds, just as sure as C. A. Brown lives; just as sure as Wilbur Hartzell lives; just as sure as Mrs. Hartzell lives; just as sure as Mr. Price Sr. lives; as sure as this complainant lives; just as sure as that letter lives wherein Smith wrote the words "I shall provide"; just as sure as those four subsequent years of letters live, wherein he surely *did* provide; just as sure as his very latest parental letter to the complainant lives and provides; just as sure as that last letter *confirms* his total 14 years of parental experience and "thoughtful consideration"; just as sure as that last parental writing is as generous, and considerate, and painstaking, and fatherly, and disposing as any man's *will* could be; just as sure as he always remembered the "existing condition" that he had turned this "adopted daughter's" husband out of doors; just as sure as he financed this daughter's divorce; just as sure as these tense acts were attended with words; just as sure as he *consented in writing* to the second marriage; just as sure as these high acts laid hold of every shred of honor and decency in him; just as sure as the defendant's seven witnesses, and our five witnesses, testify as they do; just as sure as we can survey the combined testimony of these im-

pressive and unobstructed twelve; just as sure as we can survey the combined and universal testimony of parental solicitude, from the day of the mother who stood before King Solomon to the day of Peter B. Smith.

When we know there was some provision, and *both these parties* know there was some provision, and one of them tells *how much*, and the other *refuses* to tell, there remains just one *possible* rule of evidence and of honesty; the complainant's version is entitled to prevail, *not chiefly* upon her *own assertion*, not chiefly upon the defendant's *default*, but *chiefly* upon the defendant's *confession*.. This brutish child robbery stands exposed to observation and we are here to ask of equity those rights which equity is always swift and eager to accord.

XII.

The following facts are undisputed: The defendant was a widow without estate or offspring, residing with her mother at Fargo, North Dakota. She was engaged in no avocation. What became of the young son of her deceased husband, Captain Graham, I was not permitted to inquire (Rec. p. 476). He was not a member of her family. Smith was very well-to-do. His home was in Minneapolis. This complainant, from the hour of her good mother's death, had been the keeper of that home. According to the

time-honored servant, Emily Carlson, that home was sweet. The daughter had two young babies, sons of the husband whom Smith had ejected. One morning Smith telephoned the complainant that he had an old friend in town, and asked the complainant to join them at lunch. That friend was the defendant. Events moved rapidly. One evening, about two months afterwards, the daughter and some friends attended an entertainment. Smith was alone in his big house in Minneapolis that evening, save and except for the presence of the defendant, and there on that night they engaged to marry. We read of historic characters and forget there are characters today who rival those of whom we read. Smith had lived happily there in that home up to that time, in preference to all of his clubs, in the society of his "daughter" and her offspring, whom he had retined by strife and contention as his own. They were all he had in the world. He said so (Rec. p. 196). We may *know* he said so.

But in fluttered this defendant "with the mein of lord or lady" and engaged his hand, at night time, as he pondered weak and weary. And who was it? She is put on her oath, "who are you?"

"The spirit I that evermore denies." Four years later, Smith visited that family of his at

Mill Valley, California, radiant with joy and gifts. After that last glad visit at Mill Valley he lived 15 months, in Minneapolis, alone with this wife. And today she is on her oath.

After that visit to his family, in *May*, 1906, did he *mention* them *again in all the 15 months* down to his sudden and untimely death in *August*, 1917, as he trudged up a mountain side with you on an August midday? In those last 15 months of his life did he *mention them again*?

Nevermore.

Was he constant in bestowing his affection on a child?

Nevermore.

Did he tell you of his will?

Nevermore.

Did he tell you once a *word* of the *care* of his *estate*?

Nevermore.

Did he bid you to continue any one of his intentions, sendings, presents, gifts and tokens, that he showered on his people, ever once a shining penny for the children he adored? Did he ask your least attention on the younger generation? Did he ask you to observe them? Did he will you to remember? Did he bid you to relieve them from his ample stock and store?

Nevermore.

Did he tell you what was said at the time of the *divorce*; the divorce he planned and financed while his daughter was in child-birth?

Nevermore.

Had he *any will or thought in respect* of these his *people*? Did he lisp a meditation? Can you give us any truth? Can you give us an "account"? Can you breathe an explanation?

Nevermore.

Ghastly, grim and ancient raven; thing of evil, bird or devil, whether tempter sent or whether tempest tossed thee here ashore; be that word our sign of parting! Leave no black plume as a token of that lie thy soul hath spoken. Get thee back into the tempest, and the night's Plutonian shore.

There *was a mental part* in this Mr. Smith. The defendant's confession of it shines like a diamond in the mud. Let us have a judicial decree upon the *facts*. When you know a thing is so, what more do you demand? When you know a thing is so, and the truth is well befitting, what more is there that equity requires?

This dead clammy grip of perjury is wierd and appalling. What is its indissoluble hold and charm? Is there no way to break its spell? Is there no way it can be thrown down from its

high seat? Is there no way it can be dethroned and cast out of equity? Can we never lift our souls from out its shadow? Will it take its beak from out our hearts, *nevermore*?

Twelve blighting, withering impeachments of this ominous presence, by twelve unobstructed witnesses, yet it holds its proud triumphant station just above the chamber door.

I would willingly bury all this spectacle in silence, that crimes so abominable may not be seen to have paraded, without chastisement, before the eyes of the court. But do I say that in lieu of chastisement, there are twelve fatal digressions from the undisputed facts, in one judicial opinion in that wicked person's favor?

I.

"*Father speak to me.*" The words in quotations hereinafter are from the *defendant's own witnesses or documents*, unless the contrary is shown:

We proved Smith's parental agreement with his "daughter" (609) his "adopted daughter" (585-6) at the time when he expelled her husband.

"Donald . . you have got to leave this house," said Mr. Smith. "I will buy you a railroad ticket to any place you want to go. It does not make any difference where" (Rec. p. 521). Donald

had to go, and go he did. Turning then to his "*daughter*," babe in arms, in that bleeding time, *what did he say to her?* What would be more interesting than to know? And is there *no way* we can ascertain *anything about it?* The *court can find no way!* First let us notice one other thing all agree *he did*. He put her *over his whole house*, "the same as he mother had been." "That was what Mr. Smith told me," says the defendant's witness, the head servant, Emily Carlson, and that position, all concede, she filled the next two years, and until she was supplanted by the defendant (Rec. pp. 564-5).

We can know what Smith said to his *servant*, and we can know what he *said* to his *daughter*. The *complainant* knows what he said, and the defendant knows what he said. The complainant *tells*, and the *defendant refuses to tell*. Do you believe, for one moment, that this woman lived alone with Smith, as his wife, four long years thereafter, morning and evening, summer and winter, without ever learning one thing that her husband had said to his daughter in that tragedy of 1900-1902? Do you believe her, in that *reticence*, any more than you believe her in that bold *assertion*, wherein and whereby she defames Smith's parental affection and confesses the falsehood? Smith seized and held in his hand, in that momentous hour, the fate of these

three young lives. They were powerless to resist. He knew it, and he was not a cannibal. He financed the divorce and made irrevocable the hand of his intervention. The ejected husband is today a prominent surgeon at Carson City, with a new wife and family. Meanwhile this family Smith beheaded, are destitute and Smith is dead. Mr. Smith was of age and he made a bold venture. He had brought up this girl in luxury, and he was persistent now in carrying this family separation to a finality, and he said *something* about the future of those in whose destiny he had busied himself so irretrievably. He knew this was solemn business. This lawsuit deals in *magnitudes*. The units of this case are human careers, and this was no time to shirk. What did Smith say? In that whole drama, *what did he say? Nothing*, that the defendant can tell; nothing that the *court can find! Good or bad, yea or nay; pro or con*; in that whole two years; what did he *say?* We are entitled to *know. Nothing* that the defendant can tell; nothing that the court can find.

The speech suppressed is the speech that formed the trust. The statute presumes that the conversations suppressed by the defendants are adverse to the defendant (L. O. L., 799).

In constant terror, like Lady Macbeth, of the load she has to conceal, she struggles pitifully

and miserably to argue that Smith was a very silent man (Rec. p. 452).

The Maclean expulsion is admitted and described by the defendant's witness Lauderdale, but the court can no more find what Smith so *did*, than the court can find what Smith *said*. Smith's *expulsion* of Maclean is an overmastering verity in this case, yet the court below and this court can no more find that admitted *expulsion*, than the *inevitable ensuing conversation*.

"Donald . . . you have got to leave." such is the defendant's own unquestioned proof (Rec. p. 521).

"Trouble arose which resulted in Dr. Maclean leaving," such are the dry bleached bones of the proof, displayed by both courts to a candid world (Rec. p. 101).

In the name of all the sages of equity, I pray you, divulge the pivotal truth of this case, or keep farther away from it.

Some decent parental stipulation for the fate of these babies and their mother, is as *sure* as this strenuous parental *expulsion* of their *husband* and *father*, and that stipulation is *proved* by the *complainant's disclosure* by the *defendant's* desperate attempt at *concealment*, and by Smith's *undeniable* subsequent *directions* to the *defendant*.

What the defendant *conceals* is *adverse* to *herself*, and there is nothing *adverse* to her, on these *issues*, but a *family trust*, and we crave *obedience* to the mandate of the *statute*.

But we are only *approaching* the *judicial errors*! The opinion of the court below *quotes* the complaint, verbatim, and at great length, where she relates how her adopted father ejected her husband, promoted the divorce, and asked her to stay with him, and keep his home, on the promise that all he had should be hers, when he was gone.

Out of this long quotation of the complainant the court makes a *short omission* (Rec. pp. 101-2, 106 and 197-98), and *after* this long quotation the court makes *just one* *adverse comment*. It is an alleged discrepancy of *date*. The complainant says the agreement with her father was made in *April or May*, and that the divorce was thereupon filed when the agreement was made, that she thinks it was, but the divorce was not, in fact, filed until *September*. The court quotes those recitals and bids us remember that the divorce was not filed until "*fall*," (Rec. p. 106), which might mean September, October, November or possibly, *December 20th*, and so the court leaves an unaccounted, and unexplained discrepancy of possibly as much as 8 months, from *April* to *December*, upon which he bases

that one judicial comment. For aught anyone can know, from the published report of this case, in the Federal Reporter, the complainant might have dropped out of Smith's sight, that whole space of 8 months; but when you observe certain stars, midway of that long judicial quotation of the complainant's words (Rec. p. 102) and discover from the unpublished record, (Rec. pp. 198-9) that the few words omitted from the court's quotation, where the stars are inserted, tell you that the complainant was under Smith's parental roof pregnant, with her second child, that summer; when you learn, as the reward of your inquisitiveness, that the true chronology is this, that the agreement was made in April or May; that the complainant's pregnancy was then about seven months under way; that the child Robert was born there at home in July, and that the divorce was filed in September, (Rec. pp. 198-199), after convalescence, and that the judicial stars, which you see (Rec. p. 102), take almost as much room as the information they displace, (Rec. p. 198), then will you not declare I am far too tame when I say the court has deflected, and digressed from the flint rock of the record? Will you then say the judicial comment becomes at all deceptive? At all laborious? Will you say this court-found discrepancy has become as mist in the wind? Will you not marvel why the court made that short omission? Will you say this

pregnancy and child-birth, are worthy of no notice while you are reciting the events of that summer? Will you appreciate the judicial exigency that *removed* these facts from your sight?

Mr. Smith, strong man that he was, in his vast disparity of parental position, promoting the divorce of this "daughter" of 20, in the last stages of pregnancy, yearning over her in the agonies of travail, striving to supply the place of the mother, who had *departed*, since she and Smith *together*, suffered *with* the complaint at *Honolulu*, on the deliverance of her first child, Smith comforting the daughter, now, as best he could, and naming the babe "*Robert*," because his pet name for its mother was "Bob" or "Bobbie." (Rec. pp. 200, 172). Is all this beneath equitable notice?

Restore those few words that equity has *cut out* of the pulsing heart of this case, and the court's *dead copying* comes to *life*, while the court's projected *doubt* of the veracity of this defenseless girl in a matter of *date*, is converted into her positive *confirmation*!

The eager father and his attorney, knew far more about the *date of filing* the complaint, than this girl, and they timed matters so the case would not be tried during the complaint's confinement.

It is not so much the unfounded and ungrounded judicial comment. It is the judicial blood-letting of the record, ex industria, which furnished the invidious comment nourishment. Truth and gallantry become the noble externals, and baseless reflection becomes the innermost essential. But such judicial subversion requires high pressure effort, and rather futile too, for after all the truth, like a checked and choked up stream, can dash with all its native force, and all its acquired momentum, into the bed from which it has been debarred. The court *shrinks back* from the stubborn facts, and the cardinal truths, and who is to challenge this high judicial portrayal of people and events? For does not the court assure the reader that it *is* a high grade portrait? Does not the court declare that in and by his statements "the relations of these parties are *quite fairly indicated*." (Rec. p. 113.)

It is a perpetual judicial memorial of this family, sent to the ends of the earth, upon the high warranty of the national court, on the wings of the Federal Reporter. But this is only a beginning of our grievance and more things happened in the construction of this decree than are dreamt of in your philosophy.

II.

The witnesses suffer with the complainant the sting of erroneous judicial quotation. And so does the *memory* of the *decedent*. As the noon-day sun to the starless midnight, so is the Peter B. Smith of Honolulu and Mill Valley to the Smith of this decree. Honolulu and Mill Valley are not on the judicial map. But *Wilbur Hartzell* on the *witness stand* in *Portland* gives *much* the same *impression* as *Smith* at *Honolulu*. Smith's successive letters of his *own*, and Hartzell's words of the *defendant's* own, and C. A. Brown's concurring letter look like harmony to a salutary result, but they all perish together from this judicial decree.

Four witnesses relate the defendant's confession of this trust, soon after Smith's death, four witnesses—two *men* and two *women*—C. A. Brown, Wilbur Hartzell, Mrs. Hartzell and the complainant. The opinion of the court below mentions the two women, omits the two men, calls his review the "plaintiff's proofs," (Rec. p. 109), and says those proofs are "upon the whole" insufficient. (Rec. p. 114.)

III.

Fourteen years substance of the parental relation, comprise the innermost secret of the case. To this all other facts are tributary. Fourteen

years substance of the parental relation *prove* the *contract*. They *directly* prove the *executed consideration*, and the *intent*—very little more proof of a contract is necessary in such cases, even as between *adults* and non-relatives. This is settled in *Brown vs. Sutton*, 129 U. S. 238-242-3. Following on the heels of that rule, comes the twin law of statute and equity, above cited, that no contract at all is *needed*, in favor of a child of *substantial or technical adoption*, not *named in the will*. The importance of this uncontradicted *relation* of the parties therefore is *obvious*.

As well take the *sun* out of the *sky*, as what the court has taken *out* of this *record early and late*.

(a) The court proclaims to the world that at a *certain time* Smith “discontinued all allowances for the support of plaintiff and the children.” (Rec. p. 110.) That was in 1906, and *every reader* will *say* that, be the cause ever so *foul* and sinister, no money after that time found its way from Smith to his family, and that his disposing *intent died* before his body. Quite in line with that unhappy conclusion, there is nothing, *nothing, absolutely nothing*, in this judicial delineation, to show that the complainant ever as much as *saw*, or *heard from*, Mr. Smith those last months of his life. This *self-styled fair statement* of this *family relation* leaves the re-

lation a blank, and a *cipher* for almost the last crucial year.

And what is the truth? There were *letters* and *remittances* in that time and down to the verge of Smith's tragic death; letters and remittances, as "glad" and cordial and solicitious and fatherly, as any father in any city ever sent to a child in the world. (Rec. pp. 596-7.) A *frightful* judicial divergence from the case. Not the slightest figment of evidence to bolster the assumption of a change of heart or intent.

I would like some time to read a judicial opinion on the *facts* of this case.

A *break* in the family relation this final year? A break there must be, of course, or this defense is a vain contradiction and an infamous fraud. But *break* there was *none*—none even in the *defendant's own* final grovelling *confession!*

How are such judicial representations defensible, and how are they reconcilable with law or *justice*? Justice, august and pure; the abstract of all that is perfect in the spirits and aspirations of men; where the mind rises and the heart expands; delighting in the cause of the weak and oppressed; always eager to rescue, to relieve and to succor; majestic from its kindliness, venerable from its utility, what akin is justice to these

dreary wanderings from the warm hearth-stone of truth? Justice! Who 1900 years ago emblazoned the cheerless hillsides of Palestine, "What have *we* to do with *Thee*?"

(*b*) This judicial *burial* of the family relation in Smith's *final* year, does but follow a like interment alive, of the gladsome person of love in *former* years.

With its, wrong on wrong, exposed and confessed, its, perjury on perjury, exposed and confessed, there is nothing in the grace or character of this defense whereupon it is humanly *conceivable*, why equity *should*, or how equity *can*, discuss the relation of this surviving "*daughter*" and that deceased father, and abate *one jot or tittle* from that sacred relation, much less *denude* the case of that fitting vesture *entirely*, for sixteen months, or sixteen days, or *sixteen minutes*, and then repeat the same judicial treatment, in another period of judicial history.

In the psychological 16 months, from the complainant's marriage in London, England, in 1899, to her mother's death in Minneapolis in 1900, the family relations and visits, to and fro, from father to daughter, and daughter to father, were as constant and cordial, and, in fact *illustrious*, as any *could very well be*! In those 16 months, among other attendances, were the two weeks' marriage festivities of the young couple

with the parents in Minneapolis, and Smith's subsequent voyage and winter sojourn with the young people at Honolulu, and other visits; a series of warm family meetings, those 16 months, like a shower of sparkles that make the light glitter—but not one *shimmering* ray of that glad true light can penetrate the dark opaque walls of this judicial history, of those 16 months—and then to say that in this pitch darkening of the true light the relation of this family is “quite fairly indicated.” “No light but only darkness visible.”

That which judicially purports to be the history of this family relation those 16 months, shows *no* family relation or communication *whatsoever*. One would *surely think* from reading the *court's opinion*, that the court is treating a family *estrangement*, those 16 months, with delicate touch and lofty consideration, when, in truth and in fact, the family contact was robust and hearty and perfect and perfectly commendable. The whole judicial pronouncement, is *in all effect*, and to all intents and purposes, an “unfounded” judicial animadversion.

Here it is. Here is the judicial history of those 16 months:

“She returned with her husband soon to the United States, and accompanied him as he was transferred from post to post, but later returned with him to the home of Smith in Minneapolis.

. . . . The immediate cause, however, of their coming to Minneapolis was the illness of the plaintiff's mother. . . . After the death of her mother, which occurred on June 12th, 1900, the day of her arrival in Minneapolis, it was arranged that plaintiff and her husband should live with Smith, etc." (Rec. p. 100.)

All that is material is judicially omitted. The court essays a history of these parties and every infinitesimal figment of historic truth that concerns this case, is judicially excluded. "Post to post." Digresion from *fact*? I am far too tame. The warm truth of the case is *here*, and this purported judicial statement of fact is *there* at the *uttermost nadir*. There is no earthly way to get *farther* from the case. "Post to post." "Drift away." Parity of truthlessness? No, the same identical truthlessness. Put all these specimen Arctic fugitives in the corrective, where they belong. "Post to post." None of the opinion is one whit *better* than those "*posts*." Banish these inarticulate *posts* and *also* the inarticulate post that this woman swears her *dead husband* to have *been* in his "drift away." Throw away all the posts, and call back the *human creatures* of flesh and blood. Do away with this moot case of "inexplicable dumb shows and noise" Wilful. Don't ask me to characterize it, if it is wilful. The havoc is precisely the same whether this total

judicial abjuration of the case is "inadvertent" or "unfounded," if we may employ the terms "inadvertent" or "unfounded," applied by the supreme court to the findings of this court, in Daniels vs. Wagner, *supra*—inadvertant or no, it was well-nigh fatal. It was well-nigh impossible for this defenseless girl to master the heavy expense of appeal. Inadvertent or no, it is an unfounded smirch on the living and the dead, equally inadmissible, on every hypothesis, in this high and wide spread publication. I have dwelt upon this, because the same remarks apply with equal propriety to that whole unparalleled, astounding, bewildering, judicial opinion and representation of fact and law, which this court declares to be "a well considered opinion."

How well equity scourge the laudable affection of an acknowledged parental relation, and expunge its shining and multiplied tokens. How scourge and expunge the benign fundamentals of this case?

Sixteen months of zero in the family relation, by the judicial thermometer. I had as soon dis^oparge a man's relation to his wife as his relation to his daughter, and I deny the right of any power or office on earth, upon any cause to dis^gparge either. Such arguments whatever the source, are food for the crater of a volcano.

Shrink *farther* away from the determinative facts, I again implore you, or else state those facts as they *are*.

If the reverberating iniquity which this defendant encompasses, cannot win in equity without adding together the defendant's perjury, the defendant's calumny, the defendant's rapacity, and the court's groundless detractions then, as there is a God in heaven and a court of equity upon earth, let the defendant and her iniquity *lose*, for her crimes are not hallowed.

IV.

Worse, far worse than these total judicial errors, are judicial half-truths,.

As indicated above, the false assumption of a *receding parental interest*, is the trunk line both of the *defense and the decree*.

When Smith *first took* the complainant, as a girl of 14, the court says in effect:

I may *assume* that he treated her with parental regard.

No one can assume. Mr. Smith's parental regard does not rest upon colorless judicial assumption. It rests upon the *robust, living*, indisputable *evidence* of the *defendant's three witnesses*, Emily Carlson, Mr. Lauderdale and Mrs.

Lauderdale. Those same dead *posts* are thrust in front of the *people* and hide the *people*.

Why not give the proof its native hue? Why should we constantly tear from the case its flesh and blood, exhibiting always to the public, bleached bones and "dead-men's skulls and . . . holes where eyes did once inhabit?"

V.

But, again, again! If he *treated her with parental regard*, as a *girl of 14*, how did he treat her as a mother of two children at the age of 26 or 28? *That is the far more important question here.* How did he treat her at the *last*? How did he view, *as a whole*, his *14 years' experience*, of this parental relation. How then *was* it, *yea or nay*? The *letters* for one thing would be splendid evidence, but the court in this regard, promulgates not a lingering *trace of evidence*, or even judicial *assumption*. The court *can not deny*, and the court *does not affirm*.

Did Smith treat her with parental regard in his last two years? If *no*, you are approaching a foundation. If, *yes*, you have shattered your decree to atoms. How is it then. We have a *right to know*. The court is *silent*. The court has cut its communication with this record in swift, inconsiderate, unreasoning judicial flight, far beyond the tall "posts."

VI.

Half-truth leaps now to double over statement. In this judicial stampede, from the bright light of Smith's last two years, the court finally reaches a halt *8 years back before Mr. Smith died.*

The court arises and *informs* the world that this complainant (8 years before Smith died), traveled abroad with her divorced natural father, Ailes, and while she was with him, the two were Mr. Ailes and Miss Ailes, *not* Mr. Ailes and Miss Smith. No one has ever doubted that this trip, 8 years before Mr. Smith died, was made with Mr. Smith's *consent*, and in the light of the history of the 8 subsequent years, and the six previous years, it would matter not one iota, if this young girl on that early trip, traveled across Europe, with her divorced father, as often as the Kaiser's troop trains.

But in the natural sense of the words, the statement is a laborious exaggeration. She traveled to London, England and back. On the outgoing trip she traveled with her father, Ailes, and on the return with Dr. Maclean, the young army surgeon, whom she met on the voyage and married, upon consent by mail from her parents, before her return, making this junior episode, however, far less remarkable than the senior

wooing of the dependant and Smith at the Smith mansion, as above recited, some three years later.

So if this offense of travel in Europe and this whole episode, *8 years* before Smith died, be more *material*, more *worthy* of equitable *publication*, more consonant with the *relish* and *purpose* of *equity*, than Mr. Smith's noble and thorough-going expressions of family *love 18 hours before he died*, "very fond of them and very proud of them," then I simply must remark again that *pattern fails* me for the task in hand.

This court does not fail to say that (five years before Smith died) the complainant, for a while, joined an opera chorus, but you do fail to reveal the defendant's *confessed* perjuries and slanders, which polluted the air of your court room. "You strain at the gnat and swallow the camel." "Ye tithe mint, anise and cummin and have left undone the weightier matters of the law, judgment and mercy and faith."

"Ye cleanse the outside of the cup and of the platter, but within they are full from extortion and excess."

VII.

A ruder shock, a rougher dislocation of fact, than *all these put together*, is *false marshaling*, and *judicial displacement*.

The complainant never had a statutory adoption. That fact was not the least impairment of Smith's whole career of parental act, intent, contract, solicitude, and disposition, as the *undisputed* facts show. On cross examination she freely admitted, upon inquiry, that once when a girl she had said Mr. Smith wished a statutory adoption, but her mother thought best not to have it so, because her own father had the prospect of a *gold mine* in Alaska. Smith, in his life time, thought none the less of the girl who made that admission on the witness stand, of a two-party conversation. Courts may stand to, or curve around this fact, or that fact. This complainant stood to the conversation that took place years ago, between herself on the *one* hand, and her then girl friend on the *other*, and she also *stood to* the conversation that took place years ago in the Smith home between herself on the *one* hand, and her adoptive father on the other.

Statutory adoption or no, Smith *long* after that, *twice* in one solemn writing (*supra*) called her his "adopted daughter," and *always* to the last, called her his "daughter" or "adopted daughter," in his every word and thought and act and gift.

Nothing, absolutely nothing, here to palliate *distortion or dislocation* of truth and fact. But

the court below falls upon this provocation, into a most dismal abyss of error.

The *defendant's* one *witness* to that gold mine conversation with the complainant, locates that talk, *about seven years before Smith's death*, but *read this high judicial statement* of fact in the *Federal Reporter*, and I am sure of one thing, *namely*, that from that your trustful reading of the solemn words of a court, it will *never enter your mind to doubt*, that the complainant uttered those words, about the gold mine, when she journeyed to Minneapolis from California, *just after Smith died*, as a *lament*, and a *reason* why Smith had not remembered her!

VIII.

Contrary to the law of civil and criminal cases the court declares that the complainant's testimony must be "*irrefragable*," reviews the evidence at great length, omits the documents and unobstructed witnesses that *are* irrefragable, and declares the testimony, "upon the whole," insufficient.

In the late case of *Coe vs. Coe*, 75 Or. 511 (1915) on a question of constructive trust, the Supreme Court of Oregon declared that "free from doubt," is *not* the rule of evidence "*in any civil case*;" but the opinion you approve and affirm declares that irrefragable *is* the rule of

evidence in this civil case, and the *same* man on the *same* street must meekly obey both these laws, and I ask you *how* that man can respect *himself* and respect the rules that demand his observance.

Say *nothing* of *civil* cases. Suppose a *criminal* judge should charge a jury: "Before you can find this defendant guilty, the evidence against him must be "irrefragable." Not a man, not a *boy*, sitting in that court room for the *1st time*, would fail to *know* better. His American *blood* would *tell* him, with unfailing accuracy that this thing is wrong, that this community is this day without administration of its laws, that this community is this day without the protecting arm of its government; that this community is this day without the sitting of its courts. This charge and demand of irrefragable evidence in judicial proceedings, would paralyze all movements, defy all law, blockade all justice, and assure full impunity to the uncontained downpour, among the people of every flood of crime, that human fiendishness can contrive, leaving nothing, nothing, absolutely *nothing*, to protect the public from all manner of thievery, save and except the defense of self, and the ordeal of battle; and this you will see is true on its face. The charge and demand of irrefragable evidence is an utter abdication and refusal and withdrawal of the

judicial function, a full stoppage of the government in its service. It is judicial devastation. Small danger that any foreign potentate will eat like that into the root of our institutions. He can scarcely come near enough.

"Beyond a reasonable doubt," is the highest assurance legally demandable of a litigant in any human tribunal and any human controversy.

This daughter's proof of her contract with her father when he put her over his house and home, must be irrefragable before she can recover against the supplanter, when in truth and in fact, on the decisions of equity and the decisions of honesty, so far from irrefragable proof of a contract there need be *no* proof of a contract *whatsoever*. This *daughter* with 14 years of virtual adoption *admitted and conceded*, is *entitled to recover a child's share* without *any* contract, "since she was forgotten in her adoptive father's will." It is *so held*, and *no court ever held the contrary*. What concentrated blend of judicial error could mount up to a higher climax than this at bar? Says the Supreme Court of the United States, in *Brown vs. Sutton*, 129 N. S. 238-242-3, even in a case not of a *daughter*, but a case of *adults* and non-relatives, that when the *intent* appears, no very strong evidence is required that a contract did exist. Who, then, is

to respect the rulings of the Supreme Court, and what then of this *irrefragable*. It gurrs and gurrs like a wrench in the wheels of justice. How much proof of a contract does the court *require* in favor of an only child of long technical or virtual adoption, recipient of fond letters of love and remittance to the last. It does not *take* much proof of a contract in such a case. It does not take *any* proof when that only surviving child is *not named in the will*.

Here then we have law irrefragable, fact irrefragable, right irrefragable, leaving no choice for equity but to live or to die. This wicked woman is caught in the meshes of this trust, caught despicably robbing a child, but what of the equitable initiative that blandly unlooses her fetters; what of the equitable conscience that is drugged into insensibility?

IX.

Was there, then, never a family jar? Yes, it came when the defendant came, and ended at least 4 years before Smith died, and related to the complainant's short comings as a financier in behalf of her wayward husband, (Rec. p. 519) and served the defendant admirably in the smooth plan of getting all the estate in her hands, what time Smith should pass away.

She seems to have intended at first to give back to the family *some* of the violet velvet, but

the pull of avarice was strong, and vice grew by what it fed on—no new case.

The babes, you know, were not particeps criminis in any financial struggles of their mother. The court quotes a truly Herodian outburst of Mr. Smith, one Sunday evening *4 or 5 years before he died*, at a *Sunday tea*, at the defendant's elbow. He is said to have exclaimed, in the progress of the tea, that he was going to do no more for his family! He was going to stop! And in administering equity what care we for the 4 subsequent years of *letters*, with their *inclosures* which *prove* that he never *did* stop. So long as some one says that he *said* at a Sunday night tea, 4 years before he died, that he was *going* to stop, why look at any later record. All that concerns equity is to see that the history and relation of these parties is "very fairly indicated."

X.

Smith died August 16th, 1907, in an attempt to walk up Mount Washington, New Hampshire, with his wife. He had made his last will the year before, but his wife did not *know* it, for she herself hath said it.

I was not at all surprised when I saw that yellow telegram from the surviving wife to the surviving daughter, and observed that the defendant waited *4 days*, and until she was back in

Minneapolis with the remains, before she made or dated that telegram. Smith died on the 16th. She made and dated the telegram at Minneapolis on the 20th, *careful to inform* the daughter, in California, that her father would be *buried* the *next day*, the 21st, but the much dreaded girl claimant came *anyway*, in a very few days, with her husband to Minneapolis, not to *learn* whether she had rights but because she *knew* she had rights.

The defendant on the witness stand swears a *telegraph strike* caused the delay in making and dating that telegram, and her confederate, Jessie Carey Smith, on the witness stand, swears that *she herself*, was the one who *sent* the telegram *for* the defendant, she thinks, and that the telegraph strike did *not* cause the delay, and the *letter* which they two between them sent to the complainant, *just after the burial*, is *here* in the *record*, and makes *no mention of telegraph strike* and *no pretense of excusing this disgraceful delay*, and the court says, "I think the explanation of the delay is very clear," and *I say this this is another frightful judicial separation from the fact and the case. These letters and telegrams, are dead shot destroyers of the defendant's whole column of crime* (Rec. pp. 370-374, 447-50, 559.)

The truth has been crushed to earth in this case, and the error wounded *ought to writhe* in pain.

XI.

All of Smith's letters that we could find are before you. Did the defendant produce any? *Not a single letter*, does she offer to your inspection, *not one*. The nearest approach she makes to it, is to show you some *black ink of her own*, that she *admits* is her *own*, and which she *says* is a *copy* that *she herself* made, with *her* busy pen, of a letter that *Smith wrote*. She copied the letter with her pen *before* Smith *sent* it. Smith *told* her to do that. She *says* so. It occurred more than 4 years before Smith died. (Rec. pp. 429 and 535.) This ink of the defendant's own, indicates that Smith was much irritated at his daughter, there 4 years before he died, about money matters. No ink of *Smith's own* could be *found on earth* with *one single unkind word*.

The defendant's witness, Mrs. Wright, is the complainant's aunt. Mrs. Wright saw the original of that letter, and she does not remember seeing these reflections on the complainant in the original. Her recollection of the letter is that Smith was trying to find a home for *Bess* and the *children* because the new wife "preferred not to have the children around." (Rec. pp. 533-536).

Now, that very dubious looking document upwards of 4 years before Smith died, is the *near-*

est approach that the *lady* or the lady's counsel, or the Federal Court, is able to make toward presenting any earthly letter of Peter B. Smith, although letters of his own to the complainant, over his own uncontested signature, are strewn through this record before you, all full of parental love and parental remittances, *down to the end of his days*, and I protest and insist such judicial treatment does not give the relation of these parties "quite fairly indicated."

In *every* letter, Smith *said* he *loved* his family, most cordially, and for each such vow he almost always inclosed a cash bond as security, down to his very latest letter we have *in 1907*. What then did Smith intend and direct *in 1907*? Tut, tut, tut. What cares equity *what* Smith wrote in *1907*, or what he *did* in 1907. Tell us what this good truthful defendant *says* he wrote in *1903*, and we will tell you what he intended and directed *in 1907*!

Smith at first *hand*? Never! Smith according to the *defendant*, great care being used even then, not to venture nearer than four years to the critical time. Go back until you *can* find an aspersion, even though it be a four years' journey and a most suspicious looking calumny, in the defendant's own hand, as the reward and the goal of this equitable excursion.

Let Smith do his own talking? Indeed no. The *defendant* shall do the talking for him.

Never was the like seen before in equity. What but the utter and hideous destitution of truth and right can be found by that judicial method?

XII.

Look how the court treated the Supreme Court of Minnesota as reported in *Robertson vs. Corcoran*, 125 Minn. 118, and other cases.

Robertson vs. Corcoran, deals with a *domestic relation*. So does the case now at bar. The court below omits those parts of the opinion in *Robertson vs. Corcoran* and other cases, which thus deals with the *domestic relation* and likewise the court omits those parts of *this* case now at bar which deal with the *confessed* and *conceded domestic relation*. It is a long way from the facts at bar to the opinion at bar. The spinning flanges of equity clutch the defendant's wavering rails of perjury.

These curves in the judicial route, are something entirely insupportable. When one judicial opinion makes a full dozen such sidewise avoidances, all equally bad, the error of that spiral is too self-evident and unmitigated to justify the discussion of judges and lawyers.

High equity does not step this way aside from the fact and that way aside from the law. Equity steps impressively *forward* with indignant self-

respect, on proper occasion, while it smites the traffic of those who defile the temple, and reinstates the reign of truth and law.

If the kingdom of wrong which this defendant labors to set up, in equity, will not stand, without *quite* so much *variety* of judicial deviation, then from every consideration, let it fall with a bang, that your righteousness may surge in, like the waves of the sea.

Just this following *fraction* of the record is enough, without more:

Point out a case in America or England, where a *strange woman* has come in at a *late day*, with a series of lies on her lips, and carried away every vestige of the family *estate*, from the helpless family, under shelter of the guns of equity. It simply cannot be found. The thing is revolting. Equity *will not* endure it. Your decree is an absolute anomaly of equitable retrogression. "*Drift away!*"

Drift, thou, thyself away, good mother of the family, whom your husband devoutly loved.

A dozen documents, a dozen witnesses, and, above all, the decedent himself, seen in a figuration of parental attendances and kindnesses, all are here in this record, before you, but no one, either witness or document, escapes an implied judicial smirch upon his veracity and integrity,

save and except this one avaricious dispenser of perjury. The court picks up the shattered fragments of the defendant's story, sticks them together and gives the world to understand that no catastrophe whatsoever has happened to her.

But the insistent truth will bubble up like a spring and burst and disjoin the judicial masonry. Truth springs up against you and down against you. What a spectacle in a court of reason and conscience. No judicial decree could be more destitute of truth, and merit, and law and justice, than the decree which stands upon such unrelieved and unmitigated errors of fact.

This decision is a system of error and family detraction, concerning matters which are not the subject of conflict or uncertainty.

When the confessed perjury and crime, in which a defense was conceived, is buried forever, in the archives of equity, the pressure must, in time, develop a dynamic so terrible, that an explosion will be heard to the end of the earth.

I have no more apology for the facts than the defense has for its perjuries and crimes.

This defendant is destitute of *everything* that *makes for equity*; destitute of *justice*, destitute of *fact*, destitute of *law*, destitute of *witnesses*, or *letter or legal citation*. Nothing left but savage

perjury and grovelling retraction, upon which she flashes her winning appeal to equity, perjury spun by herself and her one and only Jessie Corey Smith, spun by these two into a maze of denials and confessions.

You have given judgment, as it were, that a child cries in the night, at the door, and the father within refuses to stir from his eternal debauch. And it is not *true* of Peter B. Smith. It is not *true* of the dead man, nor *fair to his memory*. All who will read this whole record can *plainly see* Smith's intended and stipulated and promised provision for his family. All can see the defendant's cunning fraud. "Drift away." Drift thou thyself away, good mother of your husband's cherished family—drift away to thy fitting habitation; for in this dark drama, you were not surprised by any lion-like temptation springing upon your virtue and overcoming it before resistance could begin; nor did you do the deed to glut savage vengeance, or satiate long settled and deadly hate. It was a cool, calculating, money-making murder, not revenge; it was murder of *estate*, murder of *good name*, murder of *education*, murder of *character*, murder most foul, strange and unnatural. Drift away! Cleanse the records of equity from thy taint and contamination. In the name of God and all his governments, drift away. Take not with you an

equitable triumph on a platter of twelve judicial diversions of fact. No not twelve all one. Retire alone to thy appointed abode where you *can* "account for" this measureless wrong, and where "gaping wide thy mouth for speaking evil . . . thou hast the burning and the head that aches." Drift away. Drift away!

Why do we bring such suits in the Federal Courts when we have the option? For their design and their history.

Almost in sight of the blood-stained snows of the Revolution, the United States courts were ordained and established in order to curb and check and steady the possible short-comings of the local administration—ordained and established like colossal wheels that move in majesty and balance all the works.

And the wisdom of this plan has been signally illustrated in a large number of constitutional cases, wherein have been corrected the errors and asperities of the state courts, many of them really perverse and refractory.

In that class, by way of mere illustration, are the following cases where sadly needed instruction was handed to the courts of last resort, in the several states of Maryland, New Jersey, Wisconsin, Virginia, Missouri, Georgia, South Carolina, Louisiana, Ohio and New York, namely:

Brown vs. Maryland, 12 Wheat. 419; *Wilson vs. New Jersey*, 7 Cranch, 164; *Tarble's Case*, 13 Wall 397 (Error to the Supreme Court of Wisconsin); *Martin vs. Hunter's Lessee*, 1 Wheat. 304, (Error to the Court of Appeals of Virginia); *Worcester vs. Georgia*, 6 Peters 515; *Craig vs. Missouri* 4 Peters, 408; *Weston vs. City Council of Charleston (S. Carolina)* 2 Peters 449; *Ogden vs. Saunders*, 12 Wheat. 212 (Louisiana); *Osborn vs. Bank of the United States*, 9 Wheat. 738 (Ohio); *Gibbons vs. Ogden*, 9 Wheat. 1 (from New York Court of Errors).

The error of the court, in the case at bar, is *radical*. The right for which we struggle is no new ideal. The right we covet is simple and rudimentary; a judicial statement of the facts and the ensuing legal and equitable conclusions. If we suffer, without a murmur, the denial of that primal right, at the point where we come in real contact with our government, we need care but little who lays the taxes.

I hope to see the day when the humblest litigant, and the humblest signatory on the roll of federal attorneys, can go into any corner of the land and obtain full, exact and equal justice, in a Federal Court, against all persons and parties whomsoever.

Pardon one personal reference. Fifteen or twenty years more, maybe, will close the earthly

career of every one of us, officers of this appeal. We have traveled more than half the way. The new planet must be daily more and more a reality. The thought is solemn, yet, anything but sad. For my part, if I go tomorrow, or stay thirty years, I shall fight happily while I remain, and then lie down to pleasant dreams.

The intervening shocks will jar me some, but not too much. I shall be always sorrowful, yet always rejoicing. Over against the much we cannot know, we can place one thing, and of that one thing be well assured. When the edicts of legalized equity shall have prevailed in the matter now at bar, it will be a source of long and profound comfort to one and all of us, if, haply, in the sequence of that glad consummation, when our day on earth is done, we may ever find ourselves expectantly saying: "*When* saw I thee *hungry* and gave thee *meat*?" and hear the reply: "Inasmuch as ye have done it unto one of the least of these my brethren, ye have done it unto me."

Then, too, will you have brought to this family, authentic tidings of a departed father, no longer able now, of himself, to answer a cry of distress, but all the while turning over and over and over, in his grave, he who, throughout all his life time, if his family asked bread, would

not give them a stone, and, if they asked a fish, would not give them a *serpent*.

Something bestowed in sacred trust is fraudulently withheld by the defendant. She will not tell how much. She cannot complain when those tell who will; when the *statutes* tell who *will*, and the *decisions* tell who *will*.

Appellant's counsel hereby certifies to the court, that, in his judgment, this petition is well founded, and that it is not interposed for delay.

In the event this petition be denied, appellant prays the court, for an order that the mandate, to the court below herein, be stayed, pending application, which will in due time be submitted to the Supreme Court of the United States, for a writ of certiorari, to review the decision of this court, in the case.

Respectfully submitted,

WM. H. HALLAM,

Solicitor for Appellant.

